Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

BELL BROTHERS, *et al.*,

Petitioners,

vs.

BANK ONE LAFAYETTE, N.A. formerly known as PURDUE NATIONAL BANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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78 pp

QUESTIONS PRESENTED

Whether the Federal District Court has jurisdiction under Federal R.I.C.O. statutes to hear the Petitioners' Claims as to whether Purdue National Bank violated Federal and State R.I.C.O. Statutes.

Whether Purdue National Bank, as created under the National Bank Act, is entitled to certain immunities from Plaintiff's claims relative to the Bank's trust department acting as an escrow agent or purported escrow agent for Petitioners' investment funds.

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear below. There is no parent or subsidiary company of any party to be listed.

Petitioners:

BELL BROTHERS, as assignor for RANDY BELL, RONALD BELL, and WILLIAM BELL; ALFRED BISSONETTE; ANTHONY CAIN; JOSEPH E.CAIN; LARRY CROWE heirs; CATHERINE E. CROWE; SAMUEL DYER and DORIS DYER; heirs of JOHN R. GILLEN by JENNIFER J. GILLEN; RONALD HEDRICK; KENNETH; KINDLE; CHAD KOPPIE; CHARLES MATHEW, assignor of GERALD H. MATHEW, RICHARD J. MATHEW, ORA M. MATHEW, BEN MILLER; EUGENE MICHAELS; GLEN OBERLANDER Heirs; LARRY OBERLANDER; PAUL PETRY, as assignor for JOHN PETRY, PAUL PETRY, RICHARD PETRY AND JOHN McCABE; LEE SEWARD; JAMES SCHROEDER; CYLDE SICKLER; D. RUSSELL STUCKER AND KATHLEEN STUCKER; GEORGE WARREN, JR.; GENE AND PATRICIA WAIBEL; FRED SPENCER; EDWARD ANKER; RICHARD ASHBY; BETTY BICKNELL, Heirs of EUGENE STREIB; LAWRENCE CASTALDI TRUST; EDWARD S. KYBURZ Heirs; DALE MATHEW; VIOLA VON TOBEL; DONALD MOREHOUSE

Respondent:

BANK ONE, N.A. (Formerly known as Purdue National Bank)

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Petitioners, Bell Brothers *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 116 F.3d 1158 and is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinions of the District Court in this case are reproduced at 6a and 27a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provision of Racketeer Influenced and Corrupt Organization Act is 18 U.S.C. § 1962(c) as amended.

STATEMENT OF THE CASE

In early 1981, oil promoters William Tully, Harley Ralston, Stan Hojnowski and others along with their attorneys, Gregory Hahan and Gary Colip, and with the assistance of their Certified Public Accountant, Larry Shaw, did organize and form certain companies and limited partnerships for the purpose of selling shares in certain limited partnerships to secure oil and gas leases in Southern Kentucky and Northern Tennessee for drilling and exploration. The limited partnerships were known as the Mid-America Energy Oil and Gas Programs I through IX.

Divisional shares of the various Mid-America Energy Oil and Gas Programs were sold in various units to the public in and around Central United States. Before an investor could purchase a divisional

interest in said oil and gas programs each Limited Energy Oil and Gas Program was required to have a minimum aggregate program subscription. Further, each said program did have a maximum aggregate amount of limited partnership interest that could be sold in various units at an investment cost that was pre-determined by the limited partnership on a per program basis.

The limited partners of said investment were to bear at least ninety percent (90%) of the non-capital cost and capital cost, and seventy percent (70%) of the lifting cost, if a drilling of a well was successful. Revenues were to have been shared seventy percent (70%) by the limited partners and thirty percent (30%) by the general partners subject to certain limitations. Further, limited partners were not to be assessed for additional contributions and completion activities were to be financed by the pledge of Mid-America Energy Oil and Gas Programs partnership assets or the use of partnership revenues.

If the general partners of said partnership caused to be sold sufficient units that the minimum aggregate program subscription was met, then the general partners of the partnership would be allowed to have access to said investment funds. In each of the Mid-American Energy Oil and Gas Programs, as an inducement for the various investors, the Subscription Agreement and the Securities Offering Prospectus did state that:

> Subscription funds will be deposited in an escrow account with the Purdue National Bank of West Lafayette, Indiana and refunded without interest if the minimum aggregate program subscription is not secured." This uniform statement was made in each of the prospectus distributed to the Plaintiffs herein before they purchased their limited partnership interest in various Mid America Energy Oil and Gas Programs.

Each of the Subscription Agreements given to the various Petitioners herein did state:

> Sums rendered by investors will be deposited in an escrow account with the Purdue National Bank for remittance to the partnership if this subscription is accepted by the partnership, and the partnership is formed, or returned to the investor it this subscription is not accepted or this partnership is not formed. In the event this subscription is not accepted or the partnership is not accepted or the partnership is not formed, the subscription documents and the subscription price will be returned to the undersigned (investor) promptly.

The Petitioners provided sworn testimony that in fact the Petitioners invested in Mid-America Energy Oil and Gas Program Limited Partnership, I, II, III, IV, V, VI, VII, VIII and IX. The Petitioners provided sworn testimony that Respondent, Purdue National Bank, acted as an escrow agent for the Mid-America Energy Oil and Gas program Limited Partnerships I, III, VI, VIII and IX, and further, Purdue National Bank did open up certain accounts not designated as escrow accounts but were commonly used and identified as escrow accounts.

The Petitioners provided sworn testimony that Purdue National Bank violated its responsibilities as an escrow agent and caused funds to be distributed, transferred or withdrawn in violation of its duties as an escrow agent.

The Petitioners provided sworn testimony that Purdue National Bank, even it they did not enter into a written escrow agreement, did participate in the formation of the escrow agreement.

The Petitioners proved that Purdue National Bank by and through its officers, agents and employees did hold itself out as an escrow agent for the Mid-America Energy Oil and Gas Limited program funds so that it appeared that Purdue National Bank was in fact acting as an escrow agent.

In other words, the Petitioners did prove that even if Purdue National Bank did not sign an escrow agreement, it knowingly and

over several months permitted itself to be held out as an escrow agent for the partnership funds so it appeared to the Petitioners and to third parties that Purdue National Bank was in fact acting as an escrow agent for the Mid-American Energy Oil and Gas Program Limited Partnership funds.

The general partners of the Mid-American Energy Oil and Gas Programs did file with the Indiana Secretary of State, Securities Division, a request for exemption from fully registering the various Mid-America Energy Oil and Gas Programs. A copy of the Subscription Agreements showing the escrow terms and showing Purdue National Bank as the escrow agent was filed with said Securities Division. Further, the Subscription Agreement setting out that Purdue National Bank was the escrow agent and the terms of the escrow agreement was set out in said Subscription Agreements filed with the Indiana Secretary of State Office.

Abbreviated copies of the Limited Partnership Agreements for Mid-America Energy Programs showing the investor, the address of the investor and the amount invested in each of the Mid-America Energy Oil and Gas Programs were recorded in the Tippecanoe County Recorders Office which is just a few yards south across the street from the Purdue National Bank's Trust Department. Purdue National Bank's Trust Department at all times of this occurrence was located in a separate building that housed the main commercial division of Purdue National Bank which was four blocks west.

The Petitioners further provided sworn testimony against Purdue National Bank that William Tully the controlling agent of the Mid-America Energy Oil and Gas Programs had for a period of time prior to the formation of the Mid-America Energy Oil and Gas Program Limited Partnerships used Purdue National Bank's banking services for his own personal and business accounts. Assistant Vice President and Trust Operations Officer for Purdue National Bank, Gary M. Porro, had organizational meetings for Mid-America Energy with William Tully as general partner of the Mid-America Energy Oil and Gas Program Limited Partnerships.

These meetings concerned Purdue National Bank's agreement to act as an escrow agent for funds received from the Petitioners to be held in escrow until the minimum aggregate required amount was received as per each Mid-America Energy Oil and Gas Program or it said minimum aggregate amount was not received then the monies were to be promptly returned to the Petitioners herein.

In early 1981, Attorney Gregory Hahn wrote letters and sent a copy of the escrow agreement to Gary M. Porro, Assistant Trust Official and Vice President of Purdue National Bank indicating that Hahn understood an agreement was reached whereby Purdue National Bank would act as an escrow agent. Mr. Porro in his deposition acknowledged this letter but denied the Bank acted as an escrow agent.

In May of 1981 and for the next three months as the programs were funded, William Tully's wife and employees of Mid-America Energy Oil and Gas Programs, Carolyn Tully, and William Tully made different trips at different times to Purdue National Bank to set up the various escrow accounts for each Mid-America Energy Oil and Gas Program Limited Partnerships along with the respective properties. No accounts were set up through the normal Purdue National Bank Commercial Division located in a separate building in Lafayette, Indiana.

Separate escrow checking accounts were established for each of the Mid-America Energy Limited Partnership Programs, except Programs IX and X.

The Petitioners provided sworn testimony that William Tully, as General Partner for Mid-America Energy Oil and Gas Programs Limited Partnerships, along with Attorneys Gregory F. Hahn and Gary Porro, Trust Operations Officer at Purdue National Bank, did actually cause escrow accounts to be set up in said Purdue National Bank.

The Petitioners provided testimony under oath that the Mid-

America Energy Oil and Gas Program "*Escrow Account*" I, had an account number 1-381-62-87. That Mid-America Energy Oil and Gas Program Limited Partnerships "*Escrow Account*" II, had an account number 1-381-630-3. That Mid-America Energy Oil and Gas Program Limited Partnerships "*Escrow Account*" III, had an account number of 1-381-634-5. That further, Mid-America Energy Oil and Gas Program Limited Partnerships Escrow Account IV, had an account number of 1-381-640-2.

The Petitioners proved that an *Escrow Account* was set up for *Mid-American Energy Oil and Gas Program Limited Partnership VI* numbered account 1-381-643-6. That Mid-America Energy Oil and Gas Program Limited Partnership *Escrow Account VII had an escrow account number of 1-381-645-1.* That Mid-America Energy Oil and Gas Program Limited Partnership Escrow Account VIII had an "*Escrow Account*" number of 1-381-656-8.

The Petitioners also proved that William Tully also set up accounts with Purdue National Bank entitled "Tully Marketing", under account number 1-578-488-9, also the "Law Masters Oil Account", and further, Tully set up a checking account with the Purdue National Bank entitled "William E. Tully, Trust Account", under account number 2-501-803-1.

The Petitioners proved sworn testimony that Tully opened up Re-purchase Investment Accounts (No. I-576-074-9) with Purdue National Bank to reinvest said Petitioners' monies while the Programs were waiting to achieve the minimum aggregate balance in the accounts to break escrow. That said Re-purchase Agreements were also set up for Trenton Oil Development (a Tully Company). Thus Mr. Tully had an arrangement with Purdue National Bank that if the Petitioners' Subscription Agreements would become over $5,000 in any of the Mid-America or Mid-America bank controlled accounts, that sums over $5,000 would be put into a savings account entitled "re-purchase Agreements" with said Purdue National Bank, Investments Division, so said escrow account monies could draw

interest as stated the escrow accounts were all properly named as "Mid-America Energy" account.

Certain of the Petitioners presented evidence that they had personal contact with various officers and employees of the Trust Department of Purdue National Bank and that said Purdue National Bank's Trust officers and employees, including Chief Trust Officer of Purdue National Bank, Gary Porro, did personally acknowledge that they were aware of the escrow arrangement and encouraged the Petitioners in their investment in the Mid-America Energy Oil and Gas Programs.

Gary Woods, a general partner of certain of Mid-America Energy Oil and Gas Programs, did testify in his deposition that Purdue National Bank did agree to act as an escrow agent and that Purdue National Bank was aware from Gary Woods personal contact with the Trust Department that they knew of the escrow arrangements with Mid-America Energy Oil and Gas Programs before any of Petitioners' monies were put into the escrow accounts.

Brenda Woods, the Office Manager for the Mid-America Energy Oil and Gas Program offices in Lafayette, did testify that she personally took copies subscription agreements and prospectus of the various Mid-America Energy Oil and Gas Programs to the Trust Department at Purdue National Bank soon after the various prospectus and subscription agreements were finalized by Mid-America Energy Oil and Gas Programs' attorneys and before any of Petitioners' monies were placed in said accounts.

Larry Shaw, a C.P.A. hired by the Mid-America Energy Oil and Gas Program, did testify in his deposition that he saw a *signed escrow agreement* with the terms being basically the same as the terms as set out in the subscription agreement and in the prospectus that was delivered to the various Petitioners before they invested.

The Petitioners also provided sworn testimony that Assistant Vice President and Chief Trust Officer, Gary Porro, told five

investors personally that Purdue National Bank was acting as escrow agent for the Mid-America Energy Oil and Gas Program Limited Partnerships.

The Petitioners also provided sworn testimony against Purdue National Bank by way of testimony of Private Investigator Richard C. Gaib and Paralegal Alice Isenberg that they did obtain a list of documents from the Purdue National Bank and did see a certain Purdue National Bank Trust Department file while in the Trust Department of Purdue National Bank in Lafayette and in said file it contained Mid-America Energy Prospectuses, Subscription Agreements and other documents pertaining to the Mid-America Energy Oil and Gas Programs. This event occurred before the filing of the original law suit herein.

The Petitioners filed its claims in the United States District Court for the Northern District of Indiana alleging the facts stated above. The complaint was based upon Federal R.I.C.O. violations and various Federal Securities Law violations along with Indiana Common Law Fraud and Indiana Mini R.I.C.O. violations.

Later in 1984 the matter was transferred from the Lafayette Division to the Fort Wayne division of the United States District Court for the Northern District of Indiana because of a conflict of interest by the Lafayette District Court Judge.

The matter was set for trial on several occasion and the District Court continued the matter because of conflicts in the court's schedule.

Judgments were taken against the "Tully Group" defendants but because of insolvency no monies were ever collected on the judgments.

In early 1992, the Respondent Purdue National Bank filed a Motion for Summary Judgment and the Petitioners responded.

On October 13, 1992 the District Court denied Purdue National Bank's Motion for Summary Judgment.

In the court's memorandum opinion (page 6 paragraph 3), the District Court discussed the Issue of the Existence of the Escrow Account and stated as follows:

"DISCUSSION"

A. "*Issue of existence of escrow account*"

> Whether PNB agreed to act as escrow agent is a material fact over which there is a genuine dispute. First, Brenda Woods, a former employee of William Tully, testified that she saw a written escrow agreement, signed by parties from PNB and the Mid-American Energy Oil and Gas Program Limited Partnerships. See Deposition of Brenda Woods, at 153-54. Secondly, Larry Shaw, a certified public accountant and account for Mid-American Energy Oil and Gas Program Limited Partnerships from approximately July 1981 through 1982, testified that he saw signed escrow agreements by William Tully and someone from PNB for at lease some of the partnerships. See Partial Continued Deposition of Larry Shaw, at 7-8.

The Court went on to further say in its opinion:

> Furthermore, investor and plaintiff Fred Spencer testified that while going through legal documents contained in a Mid-American Energy Oil and Gas Program file that he saw an escrow agreement which had been signed by Gary Porro of PNB. Spencer testified that William Tully had also signed the escrow agreement and that the terms in this signed agreement were the exact terms as in the Mid-American Energy Oil and Gas Program file that he saw an escrow agreement which has been signed by Gary Porro of PNB. Spencer testified that William Tully has also signed the escrow

of agreement and that the terms in this signed agreement the exact terms as in the Mid-American Energy Subscription Agreements and Prospectuses. See Supplemental Affidavit of Fred Spencer, p 30 & 31.

Moreover, Gregory Hahn, former attorney for Mid-American Partnerships, testified in a sworn statement that he had drafter an escrow account agreement and had sent it to Gary Porro of PNB to be signed. Hahn also stated that a copy of the Prospectuses and Subscription Agreements for Mid-American Energy Oil and Gas Program No. I, II and III were also contained in the material sent to Gary Porro. Hahn further testified that a few days after he had sent this material, Gary Porro called him and they discussed the terms of the escrow agreement. According to Hahn's Sworn Statement, Gary Porro "stated that he would cause the escrow accounts to be opened up with the bank (PNB)." See Sworn Statement of Gregory Hahn, December 20, 1991.

Hahn further testifies that he remembers Brenda Woods receiving a telephone call from PNB's Trust Department and that the Trust Department asked who should be the signators on the escrow accounts. Hahn states that he recalled Gary Colip, Hahn's law associate, telling Woods who should be the signators on the escrow accounts for the Mid-America Oil and Gas Programs. See Sworn Statement of Gregory Hahn, December 20, 1991, at 2-3; see also Deposition of Gregory Hahn, at 70-71. Hahn also submitted a reconstructed copy of the alleged escrow agreement. Sworn Statement of Gregory Hahn, at 3; see also Reconstructed Document of Mid-American Energy Oil and Gas Programs Escrow Agreement (attached to Hahn's Sworn Statement). However, in an earlier affidavit Hahn testified that he never prepared an escrow agreement nor sent a prospectus or escrow agreement, or any other documents to PNB or Gary Porro other than a letter dated May 4, 1981. See Affidavit of Gregory Hahn, November 22, 1989.

Finally, PNB contends that it never represented to any plaintiff that funds deposited by William Tully into a PNB account were being held by PNB pursuant to an escrow agreement. However, investor and plaintiff Eugene Steib testified that Gary Porro had told him during a telephone conversation that if the minimum investments had been made, that Tully could break escrow, or if the minimum amount was not obtained that PNB would cause the money to be returned to the investor. *See* Affidavit of Eugen Steib, at 3. Such alleged communication by Porro is consistent with the information contained in the prospectuses and subscription agreements about the alleged existence of an escrow account and calls into question whether an escrow account was ever entered into by PNB.

Thus, this factual dispute whether or not PNB ever represented to any of the plaintiffs that an escrow account existed, combined with the testimony of Brenda Woods, Larry Shaw, and Fred Spencer, and the contradictory testimony of Gregory Hahn, creates a material issue of genuine fact as to whether an escrow agreement was ever entered into by PNB. Therefore, PNB's summary judgment motion with regard to Count X of the plaintiff's original complaint is denied.

The Court then later in its opinion stated as to federal law violations:

B. "*Issue of RICO violations*"

With regard to Counts XII and XIII of plaintiffs' fourth amended Complaint, plaintiffs content that PNB and certain PNB employees engaged in various incidents of mail, wire and securities fraud prohibited by federal and state Racketeer Influenced and Corrupt Organizations (RICO) statutes, respectively. See 18 U.S.C. 1962(c) and I.C. 35-45-6-2(a)(3). Defendant PNB contends that plaintiffs have failed to produce any facts that show or tend to show that PNB engaged in any

racketeering activities whatsoever. Specifically PNB argues that it was an outsider to Mid-America, without influence on the inter-workings of Mid-America programs or related enterprises. Moreover, PNB submits that it was in no position to influence any decision in connection with the promotion of sale of interests in Mid-America programs or to transfer or pay out funds on deposit except at the direction of the account owner.

However, a genuine issue of material fact does exist about whether or not PNB violated federal and state RICO statutes. (Emphasis added by Plaintiffs.)

First, plaintiffs present evidence that a PNB employee (Gary Porro) allegedly led plaintiff/investor Eugene Steib into thinking that an escrow account existed and that the investments (partnerships) were sound. See Deposition of Eugene Steib, at 29-31. Furthermore, Steib testified that Gary Porro told him in words, to the effect that he (Porro) had heard that William Tully had "bit it pretty big down in Kentucky" and that the investors "should make out all right." Deposition, Steib, at 30. Plaintiff Fred Spencer testified that Porro told him that most of the partnerships were "getting revenue" from the drilling and that the revenue would be deposited in PNB. Affidavit, at 4.

Plaintiffs also offer evidence that specific transfers of money out of alleged escrow accounts were performed by PNB in furtherance of an alleged scheme to defraud the investors/plaintiffs. Plaintiffs offer evidence that on September 10, 1981, PNB employees made an alleged illegal transfer of $10,000 from the account of Trenton Development, the marketing and drilling agent for Mid-America Energy Oil and Gas Program Limited Partnerships, to a co-defendant, Wilson Drilling & Exploration, through Citizens Fidelity Bank in Louisville, Kentucky. See Predicate Act 16 and PT Exhibits 1239A and 1018B. Plaintiffs offer evidence of other

alleged fraudulent transfer, in contravention of the alleged escrow agreement and without written authorization, allegedly amount to wire fraud, on several different dates, including November 9, 19981 (Predicate Act 17; PT Exhibit 1018C), November 12, 1981 (Predicate Act 18; PT Exhibit 1263A), and November 2, 1981 (Predicate Act 20; PT Exhibit J10-1081D). Moreover, plaintiffs also offer evidence that particular prospectuses stated that the partnerships had been registered under the Securities Act of 1933, when allegedly they had not. *See e.g.*, Predicate Acts 47 & 48 and PT Exhibits 524B & 515AB, 11.

To bring a RICO violation, the Supreme Court has held that a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. It is this factor, continuity plus relationship, which combines to produce a pattern." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2900 (1989). The Seventh Circuit has held that, "the predicate acts must be ongoing over a identified period of time so that they can be fairly viewed as constituting separate transactions." *Morgan v. Bank of Waukengan*, 804 F. 2d 9[illegible] 975 (7th Cir. 1986). Plaintiffs have submitted, with suffi[illegible] specifically, alleged related criminal activity over an identified period of time, to create a genuine issue of material fact whether or not PNB violated federal and/or state RICO statutes with regard to wire and securities fraud. *See e.g.*, Predicate Acts 16, 17, 18, 20, 47, 48; *see also Griffin v. McNiff*, 744 F. Supp. 1237 (S.D.N.Y. 1990) (Allegations that defendants carried out affairs of enterprise through scheme to defraud investors which continued in one form or another over a number of years, that defendants committed various acts of securities fraud and mail fraud, and that the fraudulent acts were the defendants' regular way of forming and issuing interests in partnerships were sufficient to allege a pattern of racketeering activity).

Moreover, a genuine issue of material fact exists whether PNB knew about or participated in mailing on behalf of the partnerships which might amount to a violation of 18 U.S.C. 1341 (mail fraud). Brenda Woods testified that she delivered, on two separate occasions, copies of partnership prospectuses and subscription agreements to PNB's Trust Department (Gary Porro), allegedly putting PNB on notice that an escrow account was to be established at PNB and that invested funds were not to be released until a designated minimum amount had been obtained.

Deposition of Brenda Woods at 20-24. These offerings were mailed to prospective investors.

To amount to mail fraud the plaintiffs must merely show that the mailings are in furtherance of a scheme to defraud, not be the essential part of a scheme to defraud. *U.S. v. Bohonus*, 628 F.2d 1167 (9th Cir.) *cert. denied* 100 S. Ct. 3026, 447 U.S. 928 (1980); *U.S. v. Silvano*, 812 F.2d 754 (1st Cir. 1987) (Use of the mails in payment of premiums and commissions which were necessary for transmission of proceeds of fraud to one of the defendants was sufficient for purposes of mail fraud statute even if use of the mails was not an essential element of the scheme and even if neither the defendants placed or received any of the mailings). Therefore, a genuine issue of material fact exists as to whether PNB knew about or participated in a scheme to use the mails to defraud prospective investors, e.g., plaintiffs. Thus, defendant PNB's motion for summary judgment is also denied with regard to Counts XII and XIII of plaintiffs' fourth amended Complaint.

CONCLUSION

For the foregoing reasons, Purdue National Bank's motion

for summary judgment on all counts is DENIED. Entered: October __, 1992.

William C. Lee, Judge
United States District Court

After the October 13, 1992 Summary Judgment ruling in favor of Petitioners the matter was set for jury trial on several occasions but was continued by the District Court because of a schedule conflicts on the court's calendar. The jury trial was expected to last two months.

In June of 1994 Purdue National Bank filed another Motion for Summary Judgment and Petitioners responded on February 23, 1995. Although the issue had been argued before by Purdue National Bank, the District Court treated the argument as new, namely that it was legally impossible for an escrow relationship to have been created between Petitioners and Purdue National Bank.

This same issue was addressed earlier in the District Court Order of October 13, 1992 when the District Court stated:

> Defendants argue that despite the language of the subscription agreements and prospectuses that no escrow agreement was ever reached between PNB and Tully. Moreover, defendants submit that Tully the accounts did have with the bank were regular checking and/or saving accounts, despite the fact that two such accounts were named "escrow accounts."

The District Court, as shown, did issue a prior ruling on "Whether PNB agreed to act as escrow agent is a material fact over which there is a genuine dispute".

In a pretrial order entered in the case on April 19, 1994 the parties and the court formulated the issues that was to be presented to the jury in the court ordered bifurcated trial before the main jury trial on all issues in the Petitioners' Complaint.

The issue to first be presented to the jury was:

> *Whether the bank account at Purdue National Bank in the name of The Mid America Partnership or related programs, including the Tully program, were demand checking accounts so that Purdue National Bank was only obligated to disperse or transfer funds from such accounts at the direction of the persons with signature authority over the accounts; or were the bank accounts being held by Purdue National Bank as an escrow agent or a "purported" escrow agent so the Purdue National Bank assumed additional fiduciary duties.*

Then the District Court wrongfully thereafter ruled on April 11, 1995 in its Second Summary Judgment Order that Purdue National Bank could not under any circumstances be an escrow agent because of a of delivery of Petitioners' funds to the Purdue National Bank. The District Court further ruled in its April 11, 1995 Memorandum Opinion (paragraph 4), "Of course, under Indiana law it was not absolutely necessary for the checks to have been made payable to PNB to establish an escrow."

The matter was initially appealed to the United States Court of Appeals for the Seventh Circuit in 1995 and was remanded to the District Court for further adjudication. Later on September 4, 1996 the District Court made the judgment final and appealable without changing its April 11, 1995 opinion.

Appellate briefs were filed by the Parties and an oral argument was held before the Seventh Circuit Appeal Court on May 22, 1997.

During the oral argument before the United States Court of Appeals for the Seventh Circuit the issues of federal jurisdiction over the claims of Petitioners was first raised by the appellate tribunal itself to the parties counsel.

Over objection by Petitioners' Counsel the court questioned

whether there was federal jurisdiction over the common law issue of what constituted deliveries to an escrow under Indiana law and ordered the parties to file additional briefs on that narrow issue of federal case jurisdiction only.

In Petitioners' first appeal brief the broader issue was raised that since the Purdue National Bank admitted before, during and after Petitioners' monies were deposited into the escrow accounts at Purdue National Bank that the Purdue National Bank was admittedly acting as an escrow agent or if not by law then Purdue National Bank acted as a "purported" escrow agent so the Purdue National Bank assumed and created additional fiduciary duties by its violation of Federal R.I.C.O. Statutes.

As stated after the oral argument were held the parties, counsels were directed, to submit additional appellate briefs on the narrow issue of whether there was federal jurisdiction concerning the delivery elements under Indiana Common Law Escrow Requirements.

After filing of the second set of briefs the United States Court of Appeals for the Seventh Circuit affirmed the District Courts Summary Judgment Order on June 20, 1997. In its decision the appeals court held there was no federal jurisdiction to hear the matter and that the matter should have been tried in a state court to determine "the R.I.C.O. claim and the state law theory". The court also held "that Plaintiffs position would create costs for all bank depositors without corresponding benefits."

No determination was made as to whether Purdue National Bank "purported to act" as an escrow agent "so that Purdue National Bank assumed additional fiduciary duties" *i.e.*, concerning Federal Wire Fraud, Violations, Federal Securities Violations, Federal Mail Fraud Violations, Federal and State R.I.C.O. Violations.

The Petitioners then cause this Writ of Certiorari to be filed before this Supreme Court.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE FEDERAL COURT HAD JURISDICTION UNDER FEDERAL R.I.C.O. STATUTES TO HEAR THE PLAINTIFF'S CLAIMS AS TO WHETHER PURDUE NATIONAL BANK VIOLATED FEDERAL AND STATE R.I.C.O. STATUTES.

ARGUMENT I

In the United States Court of Appeals for the Seventh Circuit Opinion, decided June 20, 1998, 116 F.3d 1158 (1997) the Appellant Tribunal stated in part as follows:

> For reasons we have explained, Plaintiff's position would create cost for all bank depositors without corresponding benefits. The Plaintiff wanted to urge such an original position they should have filed a case against the bank, in state court, which could have resolved both the R.I.C.O. claim and the state law theory. *Tafflin v. Levitt*, 493 US 455 (1990). When state law governs, state rather than federal courts must be the innovators.

Conversely the District Court in its final April 11, 1995 decision again ignored the question of federal R.I.C.O. violations, violations of federal mail fraud, wire fraud and securities fraud by Purdue National Bank as plead in Petitioners' Complaint and further failed to rule whether Purdue National Bank purported to act an escrow agent for the Petitioners thus creating additional fiduciary responsibilities for itself.

However, the District Court had ruled just the opposite earlier in the proceedings in its October 13, 1992 Memorandum Opinion overruling Purdue National Bank's Motion for Summary Judgment as shown in Petitioners' Statement of the Case herein.

Again, in the Purdue National Bank's First Motion for

Summary Judgment the issue of delivery as an element of an escrow agreement was addressed more specifically as to whether Purdue National Bank could act as an actual escrow. This same issue was raised and the court found that there was material issues in fact that should necessitate overruling Purdue National Bank's motion for Summary Judgment.

The District Court issued findings of facts showing that Purdue National Bank could have in fact acted as an escrow agent or purported to act as an escrow agent citing numerous incidences of representations by the bank to third parties and certain Petitioners herein that Purdue National Bank did act or purported to act as an escrow agent over Plaintiff's investment funds.

More importantly, the District Court as to federal jurisdiction made the following ruling as to the issue of R.I.C.O. violations (October 13, 1992 District Court Memorandum Opinion, when the District Court stated:

> With regards to count 12 and 13 of Plaintiff's Fourth Amended Complaint, Plaintiff's contend that Purdue National Bank and certain Purdue National Bank employees engaged in various incidents of mail, wire and securities fraud prohibited by federal and state Racketeering Influenced and Corrupt Organizations Act, (R.I.C.O.) statute, respectively. See 18 U.S.C. section 1962 (IC Section 35-45-6-2)(a)(3).
>
> Defendant Purdue National Bank contends that Plaintiffs have failed to procure any facts that show or tend to show that Purdue National Bank engaged in any racketeering activities whatsoever. Specifically Purdue National Bank argues that it was an outsider to Mid-America, without influence on the inner workings of Mid-America Programs or related enterprises. Moreover, Purdue National Bank submits that it was in no position to influence and decision in connection with the promotion or sale or interest in the Mid-America

Programs or to transfer or pay out funds on deposit except at the direction of the account owner.

However, a genuine issue of material fact does exist about whether or not Purdue National Bank violated federal and state R.I.C.O. statutes.

First, Plaintiff's present evidence that a Purdue National Bank employee (Gary Porro) allegedly lead Plaintiff/Investor Eugene Steib into thinking that an escrow account existed and that the investments (partnerships) were sound. *See Deposition of Eugene Steib, at 21-31.* Furthermore, Steib testified that Gary Porro told him in words to the effect that he (Porro) had heard that William Tully "hit it pretty big down in Kentucky" and that the investors "should make out all right" Deposition, Steib, at deposition at 30. Plaintiff Fred Smitzer testified that Porro told him that most of the partnerships were "getting revenue" from the growing and that the revenue will be deposited in Purdue National Bank. Affidavit, at 4.

Plaintiff's also offer evidence that specific transfers of money out of the alleged escrow account which were formed by Purdue National Bank and furthers of an alleged scheme to defraud the investors/plaintiffs. Plaintiffs offer evidence that on September 10, 1981, Purdue National Bank employees made an illegal transfer of $10,000.00 from the account of Trenton Development, the marketing agent for Mid-America Energy Oil and Gas Programs Limited Partnerships, to a co-defendant, Wilson Drilling and Exploration, through Citizens Fidelity Bank of Louisville, Kentucky. *See* Predicate Act 16 and PT Exhibits 1239A and 1018B. Plaintiff offers evidence of other alleged fraudulent transfers, incontravention of the alleged escrow agreement and without written authorization, alleged by amounting to wire fraud, on several different dates, including November 9, 1991 (Predicate Act 17; PT Exhibit 1018C), November 12, 1981 (Predicate Act 18; PT Exhibit 1263A) November 2, 1981 (Predicate Act 20, PT Exhibit J10-

1081D). Moreover, Plaintiffs also offer evidence that particular prospectuses state that the partnership has been registered under the Securities Act of 1933 when alleging they had not. *See e.g.*, Predicate Act 47 and 48, PT Exhibit 524B and 515AB, section 11.

The District Court opinion further stated:

To bring a R.I.C.O. violation, Supreme Court has held that a plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. It is this factor, continuity plus relationship which combines to produce a pattern. "*H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2900 (1989)." The Seventh Circuit has held that "the predicate acts must be ongoing or over a identified period of time so that they can be fairly viewed as constituting separate transactions." *Morgan v. Bank of Waukengan*, 804 F.2nd 970, 975 (7th Cir. 1986). Plaintiff's have submitted, with sufficient specificity, alleged related criminal activity over an identified period of time, to create a genuine issue material fact whether or not Purdue National Bank violated federal and/or state R.I.C.O. statutes with regard to wire and securities fraud. *See e.g.*, Predicate Acts 16, 17, 18, 20, 47, 48; *See also Griffin v. McNiff*, 744 F. Supp. 1237 (S.D.N.Y 1990).

In its opinion the District Court further stated:

Moreover, a genuine issue of material fact exists whether Purdue National Bank knew about or participated in mailings on behalf of the partnerships which might amount to a violation of 18 U.S.C. Section 1341 (mail fraud). Brenda Wood testified that she delivered on two separate occasions copies of partnership prospectuses and subscription agreements to Purdue National Bank's Trust Department (Gary Porro) allegedly putting Purdue National Bank on notice that an escrow account was to be established at Purdue

> National Bank and that invested funds were not to be released until a designated minimum amount had been obtained. Deposition of Brenda Woods at 20-24. These offerings were mailed to prospective investors.
>
> To amount to mail fraud the Plaintiff must merely show that the mailings are in furtherance of a scheme to defraud, not be the essential part of the scheme to defraud.

United States v. Bohonus, 628 F. 2d 1167 (9th Cir.), *cert. denied*, 100 S. Ct. 3026, 447 U.S. 928 (1980); *United States v. Silvano*, 812 F.2d 754 (1st Cir. 1987).

There is little question but what the federal courts had jurisdiction to hear the matter as shown above by the District Court's prior order and decree.

Since the facts of the case never changed how could the federal court ignores it own correct prior case rulings? Further neither the District Court nor the Circuit Appeals Court ever ruled on the issue whether Purdue National Bank purported to act as an escrow agent in any of its rulings but took the narrow view and sidestepped this issue which was clearly in favor of the Petitioners. When faced with this issue the Circuit Appeal Court after review of the parties appellant briefs and for the first time during the first oral arguments proceedings, the Seventh Circuit Court of Appeals raised the issue of jurisdiction as to whether the case should have been in state court originally ignoring the pending federal claims to be heard in the Plaintiff Multicount complaint. In Petitioners' Fourth Amended Complaint it sets out these issues of whether Purdue National Bank acted as an escrow or did a purport to act as an escrow, and whether there was federal law violations. The Petitioners have been denied totally their day in court.

Since the action was brought originally in Federal District Court the District Court could not have remand to a state court, claims which had not been originally brought in state court. *Jones v. City of Carlisle, Kentucky*, 3 F.3d 945 (1993), *rehearing and*

suggestion for rehearing denied, certiorari denied, 14 S. Ct. 1218, 510 U.S. 1177, 127 L. Ed. 2d 650 (1993).

It is undisputed that once the federal court has subject matter jurisdiction over federal claims it cannot lose jurisdiction by dismissing certain state court claims leaving remaining federal court claims "If the Plaintiff's raises a substantial federal question, the court has jurisdiction of the case and its decision must go to the merits of the case and jurisdiction is not lost because the court ultimately concludes that the federal claim is without merit." *The Fair v. Kohler Die & Specialty Co.*, 33 S. Ct. 410, 412, 228 U.S. 22, 25, 57 L. Ed. 716 (1913); *Burks v. Lasker,* 998 S. Ct. 1831, 1836, n.5, 441 U.S. 471, 476, n.5, 60 L. Ed. 2d 404 (1979).

Thus Federal claims still existed as to the issue of whether the bank purported to act as an escrow agent and thus assumed additional fiduciary responsibilities and in their actions violated federal criminal statutes as held by the district court's first opinion of October 13, 1992.

There is little question but what the federal courts had federal jurisdiction to hear Petitioners' claims and a Writ of Certiorari should be granted.

Notwithstanding the issue as to whether Purdue National Bank acted as an escrow agent or purported to act as an escrow agent, still the federal claims of the Petitioners' complaint still remained as specifically defined and set out as quoted above from same District Court opinion and should be remanded and tried before a jury.

In the District Court's Memorandum Final Opinion, (page 8, paragraph 3) the court on this matter stated:

> The court emphasizes that this inquiry is separate apart from an inquiry as to whether any of the parties ever entered into

> an escrow agreement, as the court can find that the parties intended to and did enter into an escrow agreement, but the parties failed to properly satisfy all of the necessary elements on an escrow for the escrow relationship to be consummated under Indiana law.[4]

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4. "The Court emphasizes that it does not reach the question of whether the parties intended or did enter into an escrow agreement so the curt rules *infra.* Improper Delivery of the Subject Matter of the Alleged Escrow from Plaintiffs to Mid-America is fatal to Plaintiffs claim".

However, the District Court in an obvious contradictory statement did correctly cite Indiana law when the District Court held:

> Of course, under Indiana law it was not absolutely necessary for the checks to have been made payable to Purdue National Bank to establish an escrow.

The District Court failed to explain, or failed to elaborate further that *in fact under Indiana law the Petitioners' escrow checks need not be paid payable to the escrow directly* but could in fact be payable to a third party since the Tully Group who delivered the same to the Bank placed the escrow money under the jurisdiction or control of the escrow agent Purdue National Bank and thus delivery was accomplished. As a matter of fact in the present case, Petitioners' checks could have been held in a desk drawer of Purdue National Bank's president and delivery factor would have been accomplished even without the checks being cashed but held until the minimum balance was achieved to broke escrow. But in the present case, the escrow agreement and the Petitioners' checks, the prospectuses, the subscription agreement was all delivered by the Petitioners to Purdue National Bank and put in Escrow Accounts and Bank Files. Employees of Mid-America Energy delivered to the same to the Trust Department at Purdue National Bank a required under the terms of the prospectus and of the subscription agreement. Admittedly Purdue National Bank had a copy of the

prospectuses and subscription agreement before the escrow accounts were open.

In analyzing the Federal Court Decisions it is obvious that both the District Court and the Appeals Court wrote juridical opinions totaling ignoring the issue of federal jurisdictions and issues of federal law claims against Purdue National Bank and made a narrow ruling to give in effect immunity to Purdue National Bank from its misconduct so as not to set a bad legal precedent for other National Banks operating within the United States. However, as found earlier by the District Court in it's opinion there was federal jurisdiction at all stages to this proceedings and the Seventh Circuit Court of Appeals only raised the jurisdictional issue after the case had been in litigation for 15 years without either parties, nor the District Court, (or the Appeals Court in the first appeal) ever raising the question of whether there was federal law questions versus state law questions and therefore later held there were no federal jurisdiction and thus the matter should be dismissed. The Federal Court was clearly wrong and relief should be granted to the Petitioners. *Wherefore* the Petitioners respectively pray that this Writ of Certiorari be granted or that this Honorable Court issue a Summary Order directing the United States Court of Appeals for the Seventh District to remand to the District Court for further federal law claims proceedings not withstanding its previous opinions and orders.

II. WHETHER PURDUE NATIONAL BANK CREATED UNDER THE NATIONAL BANK ACT (12 U.S.C. § 24(7) AS AMENDED,) IS ENTITLED TO CERTAIN IMMUNITIES FROM CLAIMS RELATIVE TO IT ACTING AS AN ESCROW AGENT OR PURPORTED ESCROW AGENT FOR PLAINTIFF'S INVESTMENT FUNDS AND IN THE PROCESS VIOLATED VARIOUS FEDERAL R.I.C.O. STATUTES.

Among the privileges of citizenship is included the right of access to courts for the purpose of bringing and maintaining civil claims. *Maxwell v. Bugbee*, 250 U.S. 525, 63 L. Ed. 1124, 40 S. Ct.

2 (1919). In the present case the Petitioners have been denied their right to maintain a civil action in the federal courts in violation of the laws of the United States.

On June 20, 1997 the United States Court of Appeals for the Seventh Circuit rendered a decision that in essence held that even if Purdue National Bank did act or purported to act as an escrow agent they should not be held liable to Petitioners because

> Requiring a bank to restrict all deposits until satisfying itself that the depositor is entitled to the money would pour molasses on the gears of Commence and with little benefit to people like the plaintiffs, for malefactors would just make sure that they did not maintain their accounts at the banks that were supposed to be escrow agents.

(*Bell Brothers, et al. v. Bank One, Lafayette, N.A.* (formerly known as Purdue National Bank), 116 F.3d 1158 (1997).

The Circuit Court further held that even if the Bank held itself out as an escrow agent and created a fiduciary duty to a promissory by its misconduct, the Circuit Court ruled that public policy would still protect the Bank from Petitioners' claims. The Circuit Court held

> For reasons we have explained, plaintiff's position would create costs for all bank depositors without corresponding benefits.

The Petitioners' position herein, *is so what if Purdue National Bank or if other National Banks incurs costs for falsely inducting investors to place funds into their bank and Petitioners losing their* funds because Purdue National Bank or any bank was only "purporting" to be an escrow agent and didn't intend to be an escrow agent but only admittedly acted so.

In the present case, *the Bank's acts were not a few isolated*

incidents of false representations of Purdue National Bank pretending to act as an escrow agent for Petitioners' investment funds placed in the Bank.

The Tully Group had eight investment schemes and gave to the Purdue National Bank Trust Department, over several months, funds and legal documents to continue the scheme against Petitioners. During these several months the Bank constantly held itself out to certain plaintiffs and other third parties and to legal and accounting professionals that it was acting as an escrow agent for Petitioners' funds.

The District Court in its first Finding of Facts in the Court's Memorandum Order Over ruling Purdue National Bank's first Motion for Summary Judgment the District Court did hold;

> However a genuine issue of material fact does exist about whether or not Purdue National Bank violated federal and state R.I.C.O. statutes.

October 13, 1992 Memorandum Opinion, page nine, paragraph four. The District Court's Memorandum Opinion went on to outline the sworn testimony of several plaintiffs, CPAs, Attorneys, and Mid-America Energy employees concerning their personal contacts with the Trust Department of Purdue National Bank. Its Employees and Officers constantly represented that the Bank was acting as an escrow agent for Petitioners' investment funds. The Seventh Circuit Court of Appeals then later held that

> because of the potential costs to National Banks if claims like Plaintiffs herein were to be maintained in federal courts, the costs to the National Bank would outweigh the rights of defrauders.

The privilege of a citizen to have equal rights to access to courts includes the personal right in actions of ever kind, and a right that cannot be abrogated or even suspended. *Prentiss v. Atlantic*

Coast Line Co., 211 U.S. 210, 53 L. Ed. 150, 295 S. Ct. 67 (1908); *Smith v. Ames*, 169 U.S. 466, 42 L. Ed. 819, 18 S. Ct. 418, *modified on other grounds*, 171 U.S. 361, 43 L. Ed. 197, 185 S. Ct. 888 (1898).

In the present case the District Court and the Seventh Circuit Court of Appeal by their opinions created a special immunity for Purdue National Bank from civil claims by Petitioners even through the Bank was guilty of violating federal R.I.C.O. violations by acting or purporting to act as an escrow agent for the various Mid-America Energy Oil and Gas Programs in which Petitioners' funds were invested.

The National Bank Act is an enabling Act, and a National Bank organized under it cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as one necessary to carry on the business of banking for which it was established. *Logan County Nat. Bank v. Townsend*, 139 U.S. 67, 35 L. Ed. 107, 11 S. Ct. 496 (1891).

Purdue National Bank had a Trust Department and was in the business of acting as escrow agents for customers for profit. In the present case the lower courts conceded the Bank acted or purported to act as an escrow agent over a million dollars of invested funds owned by Petitioners but the Courts denied any federal claims questions was involved even though the District Court has earlier ruled just the opposite.

Though Purdue National Bank admitted it was an escrow agent and did cause the loss of Petitioners' investment the Seventh Circuit Court of Appeals decision directly gave Purdue National Bank immunity from such misconduct because an unsupported supposed and newly created national banking policy immunities as shown above.

There is nothing in the controlling Federal Statutes or Code of Federal Regulations allowing the Courts to grant such immunities

to a National Bank or to take away the rights of United States citizens to equally seek legal redress in federal courts against a National Bank that clearly caused losses to Petitioners herein. Also there is no case decisions in the federal judicial system, except the present, to allow such immunities to exist to a National Bank. The decision creates new banking law that should be set aside.

It has been held by the Supreme Court that immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right and is just as clearly a denial of equal protection of the law to the latter class as if the immunity were in favor or, or the deprivation of rights permitted to be worked against, a large or more powerful class. *Truaz v. Corrigan,* 257 U.S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921).

One of the principles on which the United States government was founded is that of equality of right, such as free access to its courts by all citizens, and the Constitution of the United States is no respector of the financial status of persons (or National Banks) and rich and poor are to be accorded equal rights under it. *Concordia Fire Insurance Company v. Illinois,* 292 U.S. 535, 78 L. Ed. 1411, 545 S. Ct. 830 (1934).

Petitioners request this Honorable Court to grant Writ of Certiorari or remand this matter directing the Seventh Circuit Court of Appeals to set aside its decision and for the Seventh Circuit Court of Appeals to direct a remand to District Court for proceedings on the merits of Petitioners' federal and state claims.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 20, 1997

In the

United States Court of Appeals

For the Seventh Circuit

No. 96-3455

BELL BROTHERS, *et al.*,

Plaintiffs-Appellants,

v.

BANK ONE, LAFAYETTE, N.A. (formerly known as Purdue National Bank),

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 4:84-CV-72—William C. Lee, *Chief Judge.*

ARGUED MAY 22, 1997—DECIDED JUNE 20, 1997

Before COFFEY, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* A group of fleeced investors filed this suit more than 13 years ago. William Tully and some associates created a series or partnerships known as the Mid-America Energy Oil and Gas Program. Promoters pitched the program in hotels' meeting rooms; no underwriter, dealer, or other financial intermediary looked out for these unsophisticated investors' interests. The offering circulars said that funds would be held in escrow accounts at Purdue National Bank (now Bank One,

Lafayette), which would safeguard the money until each partnership reached a minimum capitalization. Tully and his associates did not honor their promises. The Bank did not act as escrow agent, and the promoters didn't wait for full capitalization (or, for that matter, invest the proceeds as the circulars promised). Ever since, the investors have been searching for deep pockets to make good the losses. The promoters settled with the investors in 1986. Other aspects of the case, such as the claims against the attorneys who prepared the offering circulars, also have been wrapped up, although not without some collateral litigation. *Insurance Corp. of America v. Dillon, Hardamon & Cohen*, 725 F. Supp. 1461, 1478 (N.D. Ind. 1988). Only claims against the Bank—under RICO and Indiana law—remain for decision. Plaintiffs agreed that their RICO theory would fail if the Bank won on the claims under Indiana law. On the eve of trial, the district court granted summary judgment to the Bank on a defense that was apparent from the complaint. Although the long delay could and should have been avoided, we agree with the district court that the investors could not prevail at trial, so the judgment is sound. (The pending RICO claim made it proper for the district court to exercise supplemental jurisdiction over the state-law claim.)

The Bank was not a promoter or underwriter of the partnerships; it did not sign the offering circulars or have a financial interest in the ventures. (Although the parties call the offering documents "prospectuses," this is misleading because the securities were not registered. See *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).) According to the circulars, the Bank was to serve as escrow agent. Nonetheless, Tully placed the money into demand accounts, over which he had (and used) full dominion. Plaintiffs believe that the Bank's failure to control access to the funds defrauded them. Plaintiffs have been unable to find any documents to show that the Bank *agreed* to hold the stakes in escrow; the statements to this effect in the circulars may have been among Tully's fictions. But the district court believed that there was a material dispute

about what the Bank agreed to do, for some witnesses are willing to testify that they saw written escrow agreements (although none has been able to produce a copy). Like the district court, we will assume that the Trust Department of the Bank promised to act as an escrow agent and told some investors so. What ended the case was the sequence we have already mentioned, now with emphasis: "*Tully placed* the money into demand accounts, over which he had (and used) full dominion." That is to say, the investors did not remit funds to the Trust Department of the Bank as escrow agent; they gave negotiable instruments to Tully, who deposited them into commercial accounts at the Bank. The district judge concluded that, under Indiana law, the fact that the money came first to Tully, and only later to the Bank, meant that the Bank could not be responsible to the investors.

Indiana treats delivery of the property to the depository agent as an essential element of an escrow. *Nation v. Green*, 123 N.E. 163 (Ind. 1919); *Osborne v. Eslinger*, 58 N.E. 439 (Ind. 1900); *Snyder v. International Harvester Credit Corp.*, 261 N.E.2d 71, 73 (Ind. App. 1970). Plaintiffs did not deliver anything to the Bank; instead they made and delivered negotiable instruments to Tully or one of the other promoters. Each check was payable to the order of a Mid-America partnership or an affiliated firm, not to the Bank as an agent. Payment to the promisee is inconsistent with an escrow arrangement. *Clanin v. Easterly Harvesting Machine Co.*, 21 N.E. 35 (Ind. 1889). That the offering circulars did not explain to the investors how to take advantage of the promised escrow is another black mark against Tully and his lawyers, but the facts are inescapable. As it happens, the partnerships deposited most of the checks in accounts at the Bank, rather than some other financial institution. Plaintiffs ask us to treat this as equivalent to delivery from the investors to the Bank; after all, they say, the funds came into the Bank's hands. So they did—but not into the Bank's hands *as the investors' agent*. Banks do not possess discretion over demand accounts. A bank is obliged to honor the instruc-

tions of the depositor and account-holder. Cf. *In re Bonded Financial Corp.*, 838 F.2d 890 (7th Cir. 1988). An escrow curtails the risk, created by the difference between the time of one party's payment and the other party's performance, that the second party will prove unfaithful. The agent holds the stakes until the agreed part of the performance has been completed, then transmits the funds. When the promisee receives direct payment, a stake-holding agent serves no function.

Which bank the promisee uses for its checking account is irrelevant. Requiring a bank to restrict all deposits until satisfying itself that the depositor is entitled to the money would pour molasses on the gears of commerce—and with little benefit to people like the plaintiffs, for malefactors would just make sure that they did not maintain their accounts at the banks that were supposed to be escrow agents. Plaintiffs' brief says that, when they saw that their checks had been paid through the Bank, they "were pulled [sic] into believing that their subscription checks were accepted by the partnership and that their monies were safe in an 'escrow account' under the protection of with [sic] Purdue National Bank." Suppose a review of the canceled checks or some other event lulled the investors; so what? By then it was too late for them to stop payment on the checks; the promoters had the money under their control. Just so with plaintiffs' contention that Gary Porro, former chief of the Bank's Trust Department, told some of their number that funds were being held in escrow. Plaintiffs have not cited any case, in or out of Indiana, supporting the proposition that a promisor's payment to the promisee, who maintains a checking account at a bank, can expose a bank to liability for a breach of a supposed fiduciary duty to the promisor. Our own research has not turned up such a case, and although no case rejects such a duty either, so novel is the plaintiffs' argument, we do not think that Indiana would endorse it. For reasons we have explained, plaintiffs' position would create costs for all bank depositors without corresponding benefits. If plaintiffs wanted to urge such an

original position, they should have filed the case against the Bank in state court, which could have resolved both the RICO claim and the state-law theory. *Tafflin v. Levitt*, 493 U.S. 455 (1990). When state law governs, state rather than federal courts must be the innovators.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER RE: *BELL BROTHERS, ET AL. V. PURDUE NATIONAL BANK* OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION FILED APRIL 11, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CAUSE NO. 4:84-CV-72

BELL BROTHERS, et al.

Plaintiffs,

v.

PURDUE NATIONAL BANK,

Defendant.

ORDER

This matter is before the court on defendant's Motion for Summary Judgment and Memorandum in Support filed on June 23, 1994. Following this court's Order of February 8, 1995, directing plaintiffs to resubmit their response in accordance with N.D. Ind. L.R. 7.1, on February 23, 1995, plaintiffs filed their Amended Answer Brief to Purdue National Bank's Second Motion for Summary Judgment along with their Statement of Genuine Issues pursuant to N.D. Ind. L.R. 56.1 and three (3) volumes of Documentary Evidence in Opposition to the Motion. Defendant filed its Reply on March 6, 1995. Thus, the Motion is fully briefed and ripe for decision. For the following reasons,

defendant's Motion for Summary Judgment filed on June 23, 1994, is granted.[1]

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986). A scintilla of evidence in support of the non-moving

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1. The court feels compelled to explain the amount of delay in fully briefing this matter. Because of plaintiffs, counsel's very serious illness, plaintiffs' counsel sought, and was granted, thirteen (13) extensions of time to respond to defendant's Motion for Summary Judgment. On January 5, 1995, defendant filed an Objection to Any Additional Extensions of Time to Respond to Defendant's Motion for Summary Judgment. In its January 5, 1995, filing, defendant did not articulate what prejudice, if any, defendant incurred because of the extensions of time. The court does not find that any serious prejudice to defendant resulted from the continuances granted in this matter.

party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id. In Re Matter of Wildman*, 859 F.2d 553, 557 (7th Cir. 1988); *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir. 1988); *Valentine v. Joliet Township High School District No. 204*, 802 F.2d 981, 986 (7th Cir. 1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 322 (7th Cir. 1992) (quoting *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact, *Celotex*, 477 U.S. at 323. The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. *Goka v. Bobbitt*, 862 F.2d 646, 649 (7th Cir. 1988); *Guenin v. Sendra Corp.*, 700 F. Supp. 973, 974 (N.D. Ind. 1988); *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960 (1983).

So that the district court may readily determine whether genuine issues of material fact exist, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the boding party contends no genuine issues exist. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record outlining all material facts to which the non-movant

contends exist that must be litigated. *See, Waldridge v. American Hoechst Corp. et al.*, 24 F.3d 918 (7th Cir. 1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson*, 477 U.S. at 249-251, 106 S.Ct. at 2511. Furthermore, in determining the motion for summary judgment, the court will assume that the fact as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion. L.R. 56.1

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. *Id.* The issue of fact must be genuine. Fed. R. Civ. P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *First National Bank of Cicero v. Lewco Securities Corp.*, 860 F.2d 1407, 1411 (7th Cir. 1988). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.* A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252. Finally, the court notes that, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained" and in such cases summary judgment is appropriate. *Mason v. Continental Illinois Nat'l Bank*, 704 F.2d 361, 367 (7th Cir. 1983).

Appendix B

FACTUAL & PROCEDURAL BACKGROUND

Much of the factual background in this cause of action relevant to defendant's present Motion for Summary Judgment is set forth in this court's Order entered on October 13, 1992, and the court will not restate facts the court has already found to exist. *Bell Brothers v. Tully*, No. L84-72 (N.D. Ind. October 13, 1992). Where further factual background is necessary to clarify the court's rulings in the present Order, the court shall so provide.

In its previous Order, the court denied Purdue National Bank's (hereinafter: "PNB") Motion for Summary Judgment because the court found "a material issue of genuine fact [exists] as to whether an escrow agreement was ever entered into by PNB." *Bell Brothers v. Tully*, No. L84-72, at 9 (N.D. Ind. October 13, 1992). On April 19, 1994, in the Pretrial Order entered in this case, the parties and the court formulated the issue that was to be presented to the jury during the first phase of a bifurcated trial. The issue that was to be presented is stated in the Pretrial Order as:

> Whether the bank accounts at Purdue National Bank in the name of the Mid America Partnerships or related programs, including the Tully program, were demand checking accounts so that Purdue National Bank was only obligated to disburse or transfer funds from such accounts at the direction of the persons with signature authority over the accounts; or, were the bank accounts being held by Purdue National Bank as an escrow agent or as a "purported" escrow agent so that Purdue National Bank assumed additional fiduciary duties?

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The parties agree that a determination in favor of defendant on this issue is outcome determinative of plaintiffs' entire case against defendant. If no escrow relationship was ever established, plaintiffs' entire case must fail. Thus, defendant's Motion for Summary Judgment, if granted, resolves the entire case in favor of defendants.

Notwithstanding this court's previous Order denying defendant's Motion for Summary Judgment, defendant presents a new argument in support of its new Motion for Summary Judgment based upon evidence not previously submitted to the court.[2] The new evidence indicates that it was legally impossible for an escrow relationship to have been created between plaintiffs and defendant. In the court's previous Order, the court found disputed facts to exist surrounding the relationship between plaintiffs, the bank accounts and PNB and whether the parties entered into an escrow agreement. However, no disputed facts exist concerning defendant's new legal theory for summary judgment.

Defendant's legal argument that plaintiffs failed to satisfy the delivery element necessary under Indiana law to establish an escrow relationship demonstrates that it was legally impossible for an escrow to have been created between plaintiffs and PNB, regardless of whether plaintiffs intended to create an escrow relationship with PNB, and regardless of whether a genuine issue of material fact exists concerning an alleged escrow agreement. As a matter of law, no escrow relationship was ever established with PNB because of the legally deficient manner of delivery.

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2. The evidence in support of defendant's new Motion for Summary Judgment was only recently made available to defendant, and thus, it could not have been relied upon as a basis for defendant's previous Motion for Summary Judgment.

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DEFENDANT'S CONTENTIONS

In sum, defendant argues that an escrow relationship between PNB, Mid-America Partnerships and the individual plaintiffs could never have been established under the facts of the case as plaintiffs have failed to satisfy all of the elements necessary to prove the existence of an escrow relationship. Defendant asserts the delivery of the subject matter of the alleged escrow (money in the form of negotiable instruments or checks) was never made to the alleged depository, PNB, as required by Indiana law, but instead was delivered to the grantee of the alleged escrow, Mid-America and other William Tully (hereinafter: "fully") programs.[3]

Defendant also argues plaintiffs are precluded from utilizing the equitable principle of estoppel as a theory of recovery as plaintiffs cannot satisfy all of the elements of estoppel. Defendant asserts estoppel is not applicable where the facts are equally known by or accessible to both parties. Defendant contends plaintiffs knew their negotiable instruments were made payable unconditionally and delivered absolutely to Mid-America and not to PNB as escrow agent. When the checks were returned to plaintiffs after negotiation, the endorsements revealed that there was no relinquishment of control by Mid-America. Thus, there was no concealment worked upon plaintiffs, but instead, plaintiffs failed to be diligent insuring their investments were properly placed in escrow.

Finally, defendant argues the evidence conclusively shows that the accounts Tully opened were not special escrow accounts, but were in fact general demand checking accounts. Defendant

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3. The court shall refer to all of the Tully programs as Mid-America.

asserts plaintiffs' own evidence demonstrates that Tully opened no other type of account at PNB.

DISCUSSION

No Escrow Could Have Been Created Under the Facts of the Case

The court must first analyze the facts of the case to determine whether all of the necessary requirements were satisfied for an escrow relationship to arise. The court emphasizes that this inquiry is separate and apart from an inquiry as to whether any of the parties ever entered into an escrow agreement, as the court could find that the parties intended to and did enter into an escrow agreement, but that the parties failed to properly satisfy all of the necessary elements of an escrow for the escrow relationship to be consummated under Indiana law.[4]

An escrow is defined as:

> A written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promiser, or obligor, or his agent, with a stranger, or third party, to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee.

Yost v. Miller, 129 N.E. 487, 488 (Ind. App. 1921).

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4. The court emphasizes that it does not reach the question of whether the parties intended or did enter into an escrow agreement, as the court rules *infra* that improper delivery of the subject matter of the alleged escrow from plaintiffs to Mid-America is fatal to plaintiffs' claims.

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In the instant case, plaintiffs, the grantors, failed to make an effective delivery of their negotiable instruments to a disinterested third party, but instead delivered the checks absolutely to Mid-America and/or Tully or his agents. Indiana courts have long held that a necessary element of an escrow is delivery to a third person as a depository. *Nation v. Green*, 123 N.E. 163 (Ind. 1919); *Osborne v. Eslinger*, 58 N.E. 439, 442 (Ind. 1900); *Clanin v. Esterly Harvesting Machine Co.*, 21 N.E. 35, 36 (Ind. 1889); *Snyder v. Int'l Harvester Credit Corp.*, 261 N.E.2d 71, 73 (Ind. App. 1970); *Christiansen v. Hockema*, 181 N.E.2d 786, 790 (Ind. App. 1962); *Union Trust Co. v. Adams*, 101 N.E. 741, 744 (Ind. App. 1913). Moreover, the subject matter of an escrow cannot be delivered to the payee or grantee of the escrow, as such delivery is an absolute delivery and the condition of the escrow becomes invalid. *Clanin v. Esterly Harvesting Machine Co.*, 21 N.E. 35, 36 (Ind. 1889); *Madison and Indianapolis Plankroad Co. v. Stevens*, 10 Ind. 1, 2 (1857); *Wilson v. Jinks*, 115 N.E. 67, 69 (Ind. App. 1917).

Plaintiffs have shown no evidence that they delivered their checks either personally, through the mail or in any other fashion to PNB for it to act as depository for their investments in Mid-America. Furthermore, no checks were ever made payable to PNB as escrow agent. All of the checks were made payable to Mid-America and delivered to Mid-America. The endorsements on the back of the checks also indicate that Mid-America endorsed the instruments evidencing absolute delivery and control by Mid-America over the funds represented by the checks, but not by PNB as escrow agent. All of the evidence in the case clearly indicates a total lack of delivery of the subject matter of the alleged escrow to a third party as required by Indiana law.

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Plaintiffs characterize the relevant legal issue now before the court as:

> "[t]hus, it is not an issue whether Plaintiffs' invested funds *were directly deposited into the various escrow accounts at Purdue National Bank* but the legal argument is over *how* the monies were delivered to the Purdue National Bank Escrow Accounts." The issue is not whether the Plaintiffs' funds were delivered to the Defendant Bank or not because they were but *how* they were deposited.

(Plaintiffs' Amended Answer Brief to Purdue National Bank's Second Motion for Summary Judgment, p. 6 (emphasis in original). Except for the liberal use of the term "escrow accounts" and the conclusion that the funds were "delivered" to PNB, plaintiffs are essentially correct. The essential question at issue is to whom were the checks made payable, and what happened to the checks once the makers drafted them. However, the evidence upon which plaintiffs rely to show that a proper delivery was accomplished fails to raise a genuine issue of material fact in light of rule of law enunciated *supra*.

Plaintiffs cite to various portions of their Affidavits, all of which state essentially the same thing, in support of their position that proper delivery of the subject matter was accomplished, and thus, an escrow was created. For example, Plaintiffs Bell Brothers state:

> 3. Before we invested in the Mid-America Energy Oil and Gas Program through our investment in a fractional interest in said limited partnership, I read the Prospectus presented to me which stated as

follows relative to Purdue National Bank acting as escrow agent for our subscription funds:

> "Subscription funds will be deposited in an escrow account with the Purdue National Bank of West Lafayette, Indiana and refunded without interest if the minimum aggregate program subscription is not secured."

5. Based upon said information, we caused a personal/corporate check representing our subscription funds investment in said Oil and Gas Program to be deposited in the Purdue National Bank with Purdue National Bank acting as escrow agent as stated in the Subscription Agreement and Prospectus.

Larry R. Shaw, the certified public accountant hired by Tully, described in his deposition how the investors were to invest in the various Mid-America programs.

> A "Let's suppose I'm a partner and I write you a check. I write you, the salesman, a check for ten thousand dollars ($10,000). How would that check be made out?" Answer, "It should have been made out to the Mid-America Energy entity, whichever one that they were going to participate in, deposited in the escrow account."
>
> Q Okay.
>
> A. "It should have been deposited" — Question, "It

should have been deposited into the escrow account?" Answer, "Per the Prospectus and the Subscription Agreement."

Q What did you mean by that, "per the Prospectus and the Subscription Agreement"? How do you know that, Mr. Shaw?

A It spells it right out in the prospectus that the monies are to be collected and held in the escrow account, noninterest bearing — I believe it was noninterest bearing —

Q Yes.

(Plaintiffs' Documentary Materials in Opposition to Purdue National Bank's Second Motion for Summary Judgment, Vol. II, Ex. P. p. 30).

These factual citations to the record demonstrate plaintiffs' mistaken reliance upon the Prospectus, Subscription Agreement and salesperson's assertions of Mid-America to set forth the proper and lawful method of delivery in order to create an escrow for plaintiffs' funds. The common law of Indiana defines the proper and lawful method to establish an escrow; not the various documents and assertions of salespersons of Mid-America. Just because those related to Mid-America indicated to the various investors that their checks should be made payable to Mid-America to be placed in escrow with PNB does not change the requirements of the law that the subject matter of the escrow cannot be delivered to the grantee, but must be delivered to a third party.

Plaintiffs further argue that no requirement exists for their checks to have been made payable to PNB for proper delivery

and to create an escrow. Plaintiffs are partially correct in this assertion. Of course under Indiana law it was not absolutely necessary for the checks to have been made payable to PNB to establish an escrow. However, the checks were made payable to Mid-America absolutely and then delivered directly to Mid-America. If plaintiffs, as they did, made their checks payable to Mid-America absolutely, under the law they could not deliver those investment checks directly to Mid-America and create an escrow. Such a delivery to the grantee defeats the entire purpose of an escrow. Plaintiffs were required under the law to deliver those checks to PNB, and not to Mid-America regardless of what the various documents and salespersons indicated.

Furthermore, if the court accepts plaintiffs' position that they effectuated a proper and lawful delivery to Mid-America for them to deposit the checks in an escrow account in PNB, plaintiffs still fail to demonstrate the proper and lawful creation of an escrow because Mid-America never relinquished control over the subject matter, the deposited funds. Where possession by the escrow agent is subject to the control of the depositor, no escrow is created. *Pethel v. Pethel*, 90 N.E. 102 (Ind. App. 1909). As shown *infra*, Mid-America never relinquished control over the subject matter as the checks made payable absolutely to Mid-America were endorsed solely by Mid-America and placed into ordinary demand checking accounts from which William Tully and Carolyn Tully could withdraw funds. *See*, *infra*.

Because plaintiffs failed to effectuate a proper and lawful delivery of the subject matter of the alleged escrow, and because Mid-America never relinquished control of the subject matter to the alleged escrow, no escrow was ever established. Thus, defendant is entitled to summary judgment as a matter of law.

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Estoppel

Plaintiffs correctly point out in their Amended Answer that the court's analysis cannot end with a finding that no delivery or relinquishment of control occurred in finding that an escrow could not have been established under the facts of the case. The Pretrial Order also placed in issue whether PNB "purported" to act as escrow agent. The parties agreed to the "purported" formulation in the Pretrial Order, and thus, allows plaintiffs to advance an equitable estoppel argument. Although plaintiffs are able to point to alleged statements of Gary Porro, formerly Assistant Vice President and Trust Operations Office at PNB, where he stated PNB held escrow accounts for Mid-America, plaintiffs are unable to satisfy all of the requirements of equitable estoppel, and thus, their estoppel argument must fail.

"Estoppel may occur when one party's conduct leads another to believe that a right will not be enforced and thus causes the one misled to act to his detriment." *Hammes v. Frank*, 579 N.E.2d 1348, 1358 (Ind. App. 1991). The necessary elements of estoppel are: (1) a representation or concealment of material facts; (2) the representation must be made with the knowledge of the facts; (3) the party to whom it is made must be ignorant of the matter; (4) it must be made with the intent that the other party should act on it; and (5) the other party must be induced to act upon it to his detriment. *Id.*

Focusing on the third element, estoppel is inapplicable where the facts are equally known by or accessible to both parties. *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987). "It is an undisputed proposition that, in a case where a person seeking the benefits of estoppel has knowledge or means of knowledge in respect to all of the facts equal to that

possessed by the one against whom the estoppel is urged, there can be no valid estoppel." *State v. Mutual Life Ins. Co.*, 93 N.E. 213, 222 (Ind. 1910). In addition, estoppel "cannot arise out of a lack of knowledge of the law, since all have an equal opportunity to know the law, and are presumed to know it." *Iterman v. Baker*, 15 N.E.2d 365, 370 (Ind. 1938). Plaintiffs fail to raise a genuine issue of material fact concerning the third element of equitable estoppel as the facts were either equally known or accessible to them concerning the lack of proper and lawful delivery to PNB to establish an escrow.[5]

Plaintiffs failed to deliver their checks to PNB for it to act as depository for their investments in Mid-America, and no checks were ever made payable to PNB as escrow agent. All of the checks were made payable to Mid-America and delivered to Mid-America. The endorsements on the back of the checks also indicate that Mid-America endorsed the instruments evidencing absolute delivery and control by Mid-America over the funds represented by the checks, but not by PNB as escrow agent. When the checks were returned to the various plaintiffs, the checks revealed that they were endorsed by Mid-America or Tully and deposited into a Mid-America account, and not a PNB escrow account. Thus, plaintiffs knew or should have known through the exercise of due diligence the lack of proper and lawful delivery to PNB to establish an escrow. Defendant could not have concealed the failure of the delivery because of the mode of delivery and the subject matter of the alleged escrow (negotiable instruments) and because the endorsements of the checks themselves indicate a lack of delivery. The endorsements

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5. The court finds plaintiffs' failure to raise a genuine issue of material fact concerning the third element of equitable estoppel fatal to plaintiffs' case, and therefore, does not analyze the other elements of estoppel.

show Tully deposited the funds into his own accounts, and thus, retained complete control over the funds.

Moreover, under Indiana's Uniform Commercial Code, plaintiffs' checks constitute an unconditional order for payment to the payee, Mid-America, but not to PNB as escrow agent. I.C. 26-1-3.1-106 and I.C. 26-1-3.1-109. Furthermore, under I.C. 26-1-3.1-412, plaintiffs, by writing checks payable to the order of Mid-America, are required to pay the check according to its terms to Mid-America. Plaintiffs also, as a matter of law, admit against all subsequent parties the existence of Mid-America and its capacity to endorse the check. Under I.C. 26-1-3.1-416 and I.C. 26-1-3.1-202, at the time Mid-America or a subsequent endorsee deposited the check at PNB, or any other bank for that matter, plaintiffs warranted that the checks were good and that the instrument was not subject to Defense or claim in recoupment. Plaintiffs have advanced absolutely no evidence that the checks were presented for deposit in an escrow account, but have presented evidence that the checks were presented and negotiated into Mid-America demand checking accounts. Thus, the bank treated the checks as any other check pursuant to the law of the Uniform Commercial Code.

In sum, plaintiffs have failed to raise a genuine issue of material fact concerning the third element of equitable estoppel as the facts were either equally known or accessible to them concerning the lack of proper and lawful delivery to PNB to establish an escrow. No concealment was worked upon plaintiffs, but instead, plaintiffs failed to be diligent to insure that their investments were properly placed in escrow based upon the information available to them. Accordingly, Defendants are entitled to summary judgment.

Appendix B

The Accounts Opened by Tully were Demand Checking Accounts

On behalf of Mid-America, William and Carolyn Tully opened seven (7) separate, ordinary, demand checking accounts at PNB for Mid-America Partnerships I, II, III, IV, VI, VII, VIII. Tully did not open "escrow" accounts at PNB.

For two (2) of the checking accounts, Mid-America III and VIII, Tully incorporated the words "escrow account" in the account names. However, the mere labeling of the two (2) demand checking accounts as "escrow" accounts does not change the demand checking accounts into escrow accounts. *Snyder v. Int'l Harvester Credit Corp.*, 261 N.E.2d 71 (Ind. App. 1970); *accord*, *Farago v. Burke*, 186 N.E. 683, 684 (N.Y. 1933). All of the accounts were governed by the terms of the Checking and Savings Account Agreements to which William and Carolyn agreed by signing the signature cards for each demand checking account, regardless of what Tully named the account. The depositor's choice of name for an account does not obligate the bank to inquire into the rights of persons not parties to the account. *Sindlinger v. Department of Financial Institutions*, 199 N.E. 715, 723 (Ind. 1936); *Texas Commerce Bank v. Townsend*, 786 S.W.2d 53, 54 (Texas App. 1990).

In his deposition, Tully testifies on cross examination that he set up all of the "escrow" accounts. However, his testimony also demonstrates that he used the demand checking accounts as his own "escrow" accounts.

> Q. All right. Now, in this sworn statement, as per Hahn's letter and as per Purdue National Bank acting as escrow agent, did you in fact you or your agents of yours of the Mid-America

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Programs to have accounts opened up with the Purdue National Bank, certain escrow accounts?

A. As I testified earlier, I did, or I —

Q. And they were escrow accounts, were they not, Mr. Tully?

A. That's the way we identified each of them.

(Plaintiffs' Documentary Materials in Opposition to Purdue National Bank's Second Motion for Summary Judgment, Vol. II, Ex. N. p. 45).

A. Not as I recall, because I always went down and set up those accounts.

Q. You what, sir?

A. I'm the one that always went down and set up the accounts, as I recall, and signed the signature cards.

Q. All right. Did you ever have your wife to go over, or have Brenda go over, or anyone to go over to the best of your knowledge?

A. Carolyn had authority to sign on them, she went and signed them, and Brenda may have later, I do not recall.

Q. Now, is it your testimony that the best of your knowledge and belief, that when these programs

were set up and Purdue National Bank was named as escrow agent, I believe in I through, up to X I believe, that, it is your belief that in fact Purdue National Bank was acting as an escrow agent?

A. That's, that's the way I was instructed by Colip and Hahn, was to go down and set up an escrow account for each program, and that's what I did.

(Plaintiffs' Documentary Materials in Opposition to Purdue National Bank's Second Motion for Summary Judgment, Vol. II, Ex. N. p. 45). Tully certainly opened accounts at PNB, but Tully did not open up "escrow" accounts. Instead, Tully opened up general, demand checking accounts, and the bank was not under a legal obligation to inquire as to the rights of others not a party to the accounts.

Bank accounts may be classified as "general," "special," or "for special purposes." *Sindlinger v. Department of Financial Institutions*, 199 N.E. 715, 722-23 (Ind. 1936). "[A] general deposit is generally held to be that the subject of a general deposit is mingled with the general assets of the depository, whose property it becomes, and its separate identity is lost, and the relation between the bank and the depositor is that of debtor and creditor . . ." *Id.* Thus, as a general principle, a bank owes its depositor whatever amounts are deposited in the depositor's account.

"[T]he subject of a special deposit is to keep safely, separate and distinct from the general assets of the bank, as the title remains in the depositor, who is entitled to receive back the identical thing deposited, and the relation assumed between the

depositor and the bank is that of bailor and bailee." *Id.* A deposit made "for special purpose" is limited to specific purposes and creates a fiduciary relationship. *Id.* The fiduciary must execute its duties according to the terms of the agreement of the deposit to fulfill the purpose of the deposit. An escrow account is a "special purpose" account. *Id.*

A deposit opened in the ordinary course of business is presumed to be a general deposit. *Id.* at 725. Tully opened general, demand checking accounts.

At the time Tully opened the demand checking accounts, a document entitled "Authority of Partnership to Open Deposit Account and to Procure Loans" was executed. It states in pertinent part:

> The undersigned desires to establish with you a deposit and checking account to be known as "*blank space to be filled in by depositor*" and hereby certify that said name is a trade name which we are using in the conduct of an unincorporated business owned entirely by the undersigned as co-partners.

In each instance, Tully designated the name of the Mid-America partnership, except in the trade name for Mid-America III and Mid-America VIII, Tully incorporated the name "escrow account." On each of the accounts, the only persons authorized to sign checks were William E. Tully, Sr. or his wife, Carolyn I. Tully. No employee of PNB, nor any other person was authorized to execute checks for funds deposited in these accounts.

In any event, had the condition of the alleged escrow been fulfilled, PNB would still not have been able to release the

monies in these accounts as it had no authority over the accounts. The Tullys retained control over the accounts at all times. PNB did not assume any fiduciary relationship over the accounts, and no special purpose account or escrow account was ever established.

CONCLUSION

For all of the foregoing reasons, defendant's Motion for Summary Judgment filed on June 23, 1994 is GRANTED.

Entered: April 11, 1995.

s/ William C. Lee
William C. Lee, Judge
United States District Court

APPENDIX C — MEMORANDUM ORDER RE: *BELL BROTHERS, ET AL. V. WILLIAM TULLY, ET AL.* OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA FILED OCTOBER 13, 1992

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CAUSE NO. L84-0072

BELL BROTHERS, et. al.,

Plaintiffs,

v.

WILLIAM TULLY, et. al.,

Defendants.

ORDER

This matter is before the court on defendant Purdue National Bank's motion for summary judgment. For the following reasons the motion is DENIED.[1]

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1. The court's ruling on defendant's motion was greatly hampered by the unorganized drafting of plaintiffs' brief and the sloppy presentation of supporting exhibits. By this conduct, plaintiffs' counsel has come dangerously close to violating Rule 1.1 (Competence) of the Indiana Rules of Professional Conduct.

Appendix C

SUMMARY JUDGMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 2512; *In Re Matter of Wildman*, 859 F.2d 553, 557 (7th Cir. 1988); *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir. 1988); *Valentine v. Joliet Township High School District No. 204*, 802 F.2d 981, 986 (7th Cir. 1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 322 (7th Cir. 1992) (quoting *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

Appendix C

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact, *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. *Goka v. Bobbitt*, 862 F.2d 646, 649 (7th Cir. 1988): *Guenin v. Sendra Corp.*, 700 F. Supp. 973, 974 (N.D. Ind. 1988): *Posey v. Skyline Corp.*, 702 F.2d 302, 105 (7th Cir. 1983), *cert. denied*, 464 U.S. 960 (1983). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson*, 477 U.S. at 249-251, 106 S.Ct. at 2511.

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *Id.* 477 U.S. at 248, 106 S.Ct. at 2510. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. *Id.* The issue of fact must be genuine. Fed. R. Civ. P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356; *First National Bank of Cicero v. Lewco Securities Corp.*, 860 F.2d 1407, 1411 (7th Cir. 1988). The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.* A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party

must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252, 106 S.Ct. at 2512.

FACTUAL BACKGROUND

In plaintiffs' original Complaint of May 31, 1984, they brought an action against various defendants described in the Complaint as the "fully Group," alleging in Counts I through IX various security violations resulting in monies lost by plaintiffs invested through certain gas and oil investment partnerships. Count X of the Complaint alleged that Purdue National Bank (hereinafter "PNB") of West Lafayette (sic) acted as escrow agent for the Mid-American Energy Oil and Gas Program Limited Partnerships I, III, VI, VIII, IX, X, and XII and further seeks an accounting.

In plaintiffs' fourth amended Complaint, plaintiffs charged in Count XII that PNB and certain other defendants engaged in "racketeering activities" in violation of 18 U.S.C. § 1961, violations arising out of the sale of Mid-American Oil and Gas Program Limited Partnerships. Plaintiffs also alleged that PNB violated its responsibilities as escrow agent and caused funds to be disbursed, transferred or withdrawn in violation of its duties as escrow agent. Plaintiffs further alleged in Count XIII of their amended Complaint that PNB committed numerous acts of "racketeering activities" within the meaning of I.C. § 35-45-6-2(a)(3).

The nexus of plaintiffs' legal claims against PNB is that PNB was the escrow agent for various Mid-American Energy Oil and Gas Program Limited Partnerships. According to the various prospectuses and subscription agreements, PNB was to serve as escrow agent. The prospectuses provided that PNB was

to hold investors' money in an escrow account, without interest, until a minimum aggregate amount was deposited. If the aggregate minimum was reached, the invested money was to be released to the operators of Mid-American for the purpose stipulated in the prospectuses and subscription agreements, i.e., to drill oil and gas wells in Kentucky. If the minimum aggregate amount was not reached by a particular date, then the investors were to receive a refund of their money in full but without interest.

Plaintiffs present evidence that the terms of the alleged escrow account were set out in the subscription agreements and the partnership prospectuses, and that some investors and employees working for William Tully stated that they saw an actual escrow agreement entered into between PNB and Tully. Moreover, plaintiffs submit a May 4, 1981, letter by Gregory Hahn, former attorney for Mid-American and Tully, as showing that Tully had told Hahn that an escrow agreement had been reached between the parties. Plaintiffs also submit testimony by Hahn that he had drafted an escrow account, that it was delivered to Gary Porro, Chief Trust officer of PNB at the time in question, and he (Hahn) had discussed the terms of the escrow account with Porro. Plaintiffs further present evidence that Gary Porro had told investors Eugene Steib and Fred Spencer that PNB was acting as escrow agent for the Mid-American Partnerships.

Defendants argue that despite the language of the subscription agreements and prospectuses that no escrow agreement was ever reached between PNB and Tully. Moreover, defendants submit that the accounts that Tully did have with the bank were regular checking and/or savings accounts, despite the fact that two such accounts were named "escrow accounts".

Furthermore, PNB contends that no one in PNB's Trust Department or anyone associated with PNB made representations to the effect that PNB was an escrow agent. PNB contends that testimony by Gregory Hahn shows that he did not prepare an escrow agreement nor any other document for PNB.

On the issue of violation of 18 U.S.C. 1962(c) and IC § 35-45-6-2(a)(3), plaintiffs submit some 50 alleged predicate acts they contend PNB engaged in amounting to racketeering activity, specifically wire, mail, and securities fraud. Plaintiffs argue that certain alleged actions of Gary Porro and other PNB employees amount to fraudulent behavior covered by federal and state statutes, including the illegal wiring of money and intentional rendering of misinformation by telephone to investors. PNB contends that no such actions, coming within the scope of 18 U.S.C. 1962(c) or IC § 35-45-6-2(a)(3), can be proved by the plaintiffs despite years of discovery.

DISCUSSION

A. *Issue of existence of escrow account*

Whether PNB agreed to act as escrow agent is a material fact over which there is a genuine dispute. First, Brenda Woods, a former employee of William Tully, testified that she saw a written escrow agreement, signed by parties from PNB and the Mid-American Energy Oil and Gas Program Limited Partnerships. *See* Deposition of Brenda Woods, at 153-54. Secondly, Larry Shaw, a certified public accountant and accountant for Mid-American Energy Oil and Gas Program Limited Partnerships from approximately July 1981 through 1982, testified that he saw signed escrow agreements by William Tully and someone from PNB for at least some of the

partnerships. *See* Partial Continued Deposition of Larry Shaw, at 7-8.

Furthermore, investor and plaintiff Fred Spencer testified that while going through legal documents contained in a Mid-American Energy Oil and Gas Program file that he saw an escrow agreement which had been signed by Gary Porro of PNB. Spencer testified that William Tully had also signed the escrow agreement and that the terms in this signed agreement were the exact terms as in the Mid-American Energy Subscription Agreements and Prospectuses. *See* Supplemental Affidavit of Fred Spencer, ¶s 30 & 31.

Moreover, Gregory Hahn, former attorney for Mid-American Partnerships, testified in a sworn statement that he had drafted an escrow account agreement and had sent it to Gary Porro of PNB to be signed. Hahn also stated that a copy of the Prospectuses and Subscription Agreements for Mid-American Energy Oil and Gas Program No. I, II, and III were also contained in the material sent to Gary Porro. Hahn further testified that a few days after he had sent this material, Gary Porro called him and they discussed the terms of the escrow agreement. According to Hahn's Sworn Statement, Gary Porro "stated that he would cause the escrow accounts to be opened up with the bank (PNB)." *See* Sworn Statement of Gregory Hahn, December 20, 1991.

Hahn further testifies that he remembers Brenda Woods receiving a telephone call from PNB's Trust Department and that the Trust Department asked who should be the signators on the escrow accounts. Hahn states that he recalled Gary Colip, Hahn's law associate, telling Woods who should be the signators on the escrow accounts for the Mid-America Oil and Gas

Programs, *See* Sworn Statement of Gregory Hahn, December 20, 1991, at 2-3; *see also* Deposition of Gregory Hahn, at 70-71. Hahn also submitted a reconstructed copyboy the alleged escrow agreement. Sworn Statement of Gregory Hahn, at 3; *see* also Reconstructed Document of Mid-American Energy Oil and Gas Programs Escrow Agreement (attached to Hahn's Sworn Statement). However, in an earlier affidavit Hahn testified that he never prepared an escrow agreement nor sent a prospectus or escrow agreement, or any other documents to PNB or Gary Porro other than a letter dated May 4, 1981. *See* Affidavit of Gregory Hahn, Nov. 22, 1989.

Finally, PNB contends that it never represented to any plaintiff that funds deposited by William Tully into a PNB account were being held by PNB pursuant to an escrow agreement. However, investor and plaintiff Eugene Steib testified that Gary Porro had told him during a telephone conversation that if the minimum investments had been made, that Tully could break escrow, or if the minimum amount was not obtained that PNB would cause the money to be returned to the investor. *See* Affidavit of Eugene Steib, at 3. Such alleged communication by Porro is consistent with the information contained in the prospectuses and subscription agreements about the alleged existence of an escrow account and calls into question whether an escrow account was ever entered into by PNB.

Thus, this factual dispute whether or not PNB ever represented to any of the plaintiffs that an escrow account existed, combined with the testimony of Brenda Woods, Larry Shaw, and Fred Spencer, and the contradictory testimony of Gregory Hahn, creates a material issue of genuine fact as to whether an escrow agreement was ever entered into by PNB. Therefore, PNB's summary judgment motion with regard to Count X of the plaintiffs' original complaint is denied.

Appendix C

B. *Issue of RICO violations*

With regard to Counts XII and XIII of plaintiffs' fourth amended Complaint, plaintiffs contend that PNB and certain PNB employees engaged in various incidents of mail, wire, and securities fraud prohibited by federal and state Racketeer Influenced and Corrupt Organizations (RICO) statutes, respectively. *See* 18 U.S.C. § 1962(c) and I.C. § 35-45-6-2(a)(3). Defendant PNB contends that plaintiffs have failed to produce any facts that show or tend to show that PNB engaged in any racketeering activities whatsoever. Specifically PNB argues that it was an outsider to Mid-America, without influence on the inter-workings of Mid-America programs or related enterprises. Moreover, PNB submits that it was in no position to influence any decision in connection with the promotion or sale of interests in Mid-America programs or to transfer or pay out funds on deposit except at the direction of the account owner.

However, a genuine issue of material fact does exist about whether or not PNB violated federal and state RICO statutes. First, plaintiffs present evidence that a PNB employee (Gary Porro) allegedly led plaintiff/investor Eugene Steib into thinking that an escrow account existed and that the investments (partnerships) were sound. *See* Deposition of Eugene Steib, at 29-31. Furthermore, Steib testified that Gary Porro told him in words to the effect that he (Porro) had heard that William Tully had "hit it pretty big down in Kentucky" and that the investors "should make out all right." Deposition, Steib, at 30. Plaintiff Fred Spencer testified that Porro told him that most of the partnerships were "getting revenue" from the drilling and that the revenue would be deposited in PNB. Affidavit, at 4.

Plaintiffs also offer evidence that specific transfers of money

out of alleged escrow accounts were performed by PNB in furtherance of an alleged scheme to defraud the investors/ plaintiffs. Plaintiffs offer evidence that on September 10, 1981, PNB employees made an alleged illegal transfer of $10,000 from the account of Trenton Development, the marketing and drilling agent for Mid-America Energy Oil and Gas Program Limited Partnerships, to a co-defendant, Wilson Drilling & Exploration, through Citizens Fidelity Bank in Louisville, Kentucky. *See* Predicate Act 16 and PT Exhibits 1239A and 1018B. Plaintiffs offer evidence of other alleged fraudulent transfers, in contravention of the alleged escrow agreement and without written authorization, allegedly amounting to wire fraud, on several different dates, including November 9, 1981, (Predicate Act 17; PT Exhibit 1018C), November 12, 1981 (Predicate Act 18; PT Exhibit 1263A), and November 2, 1981 (Predicate Act 20, PT Exhibit J10-1081D). Moreover, plaintiffs also offer evidence that particular prospectuses stated that the partnerships had been registered under the Securities Act of 1933, when allegedly they had not. *See e.g.,* Predicate Acts 47 & 48 and PT Exhibits 524B & 515AB, ¶ 11.

To bring a RICO violation, the Supreme Court has held that a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. It is this factor, continuity plus relationship, which combines to produce a pattern." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2900 (1989). The Seventh Circuit has held that, "the predicate acts must be ongoing over a identified period of time so that they can be fairly viewed as constituting separate transactions." *Morgan v. Bank of Waukengan,* 804 F.2d 970, 975 (7th Cir. 1986). Plaintiffs have submitted, with sufficient specificity, alleged related criminal activity over an identified period of time, to create a genuine

issue of material fact whether or not PNB violated federal and/or state RICO statutes with regard to wire and securities fraud. *see e.g.*, Predicate Acts 16, 17, 18, 20, 47, 48; *see also Griffin v. McNiff*, 744 F.Supp. 1237 (S.D.N.Y. 1990) (Allegations that defendants carried out affairs of enterprise through scheme to defraud investors which continued in one form or another over a number of years, that defendants committed various acts of securities fraud and mail fraud, and that the fraudulent acts were the defendants' regular way of forming and issuing interests in partnerships were sufficient to allege a pattern of racketeering activity).

Moreover, a genuine issue of material fact exists whether PNB knew about or participated in mailings on behalf of the partnerships which might amount to a violation of 18 U.S.C. § 1341 (mail fraud).[2] Brenda Woods testified that she delivered, on two separate occasions, copies of partnership prospectuses and subscription agreements to PNB's Trust Department (Gary Porro), allegedly putting PNB on notice that an escrow account was to be established at PNB and that invested funds were not to be released until a designated minimum amount-had been obtained. Deposition of Brenda Woods at 20-24. These offerings were mailed to prospective investors.

To amount to mail fraud the plaintiffs must merely show that the mailings are in furtherance of a scheme to defraud, not

---

2. I.C. § 35-45-6-2(3) provides:

> a person: . . . (3) who is employs by or s act ted with an enterprise, and who *knowingly* or *intentionally* conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity, commits corrupt business influence, a Class C felony (Emphasis added).

be the essential part of a scheme to defraud. *U.S. v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied* 100 S.Ct. 3026, 447 U.S. 928 (1980); *U.S. v. Silvano*, 812 F.2d 754 (1st Cir. 1987) (Use of the mails in payment of premiums and commissions which were necessary for transmission of proceeds of fraud to one of the defendants was sufficient for purposes of mail fraud statute even if use of the mails was not an essential element of the scheme and even if neither the defendants placed or received any of the mailings). Therefore, a genuine issue of material fact exists as to whether PNB knew about or participated in a scheme to use the mails to defraud prospective investors, e.g., plaintiffs. Thus, defendant PNB's motion for summary judgment is also denied with regard to Counts XII and XIII of plaintiffs' fourth amended Complaint.

CONCLUSION

For the foregoing reasons, Purdue National Bank's motion for summary judgment on all counts is DENIED.

Entered: October 13, 1992.

s/ William C. Lee
William C. Lee, Judge
United States District Court

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 18, 1997

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

No. 96-3455

BELL BROTHERS, *et al.*,

Plaintiffs-Appellants,

v.

BANK ONE, LAFAYETTE, N.A., formerly known as Purdue National Bank,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Appendix D

No. 4:84-CV-72
William C. Lee,
Chief Judge.

Order

Plaintiffs-appellants filed a petition for rehearing and suggestion of rehearing en banc on July 7, 1997. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E — ORDER GRANTING EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI DATED OCTOBER 23, 1997

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

October 23, 1997

Mr. Dean E. Richards
3003 E. 98th Street
Suite 111
Indianapolis, IN 46280

Re: Bell Brothers, et al.
v. Bank One, Lafayette, N.A.
Application No. A-298

Dear Mr. Richards:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on October 23, 1997, extended the time to and including December 15, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By s/ Melissa A. Blalock
Assistant Clerk

Supreme Court, U.S.
FILED
JUN 12 1998
CLERK

No. 97-1010

In The

Supreme Court of the United States

October Term, 1997

BELL BROTHERS, ET AL.,

Petitioners,

vs.

BANK ONE INDIANA, N.A., FORMERLY
BANK ONE LAFAYETTE, N.A.;
FORMERLY PURDUE NATIONAL BANK,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circiut**

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether Petitioners' argument that the Federal District Court has jurisdiction under Federal RICO statutes to hear the Petitioners' claims relative to Purdue National Bank's alleged violation of Federal and State RICO statutes presents any issue for review where Respondent has never argued against jurisdiction, the judgment of the district court was on the merits, and the Seventh Circuit Court of Appeals specifically stated that jurisdiction of the district court existed.

2. Whether Petitioners' argument that Purdue National Bank, as created under the National Bank Act, is not entitled to certain immunities from their claims relative to the Bank's trust department acting as an escrow agent or purported escrow agent for Petitioners' investment funds presents any issue for review where Respondent Bank has never claimed any immunities as a defense and the district court entered judgment for Respondent Bank based on evidence prejudicial to Petitioners' case rather than on immunity of the Bank to Petitioners' claims.

LIST OF PARTIES

The proper respondent to the Petition for Writ of Certiorari should be:

BANK ONE, INDIANA, N.A. (Formerly Bank One, Lafayette, N.A.; formerly Purdue National Bank)

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RULES CITED:

SEC Rule 10(b) 2

Sup. Ct. R. 10 7

STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals entered its judgment on June 20, 1997 and denied rehearing on July 18, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is about a group of unsophisticated investors who lost money to a slick promoter and ever since have been looking for a deep pocket to make good their losses. This case is not about jurisdiction or immunity, the issues described by Petitioners, but about lack of evidence showing a relationship existed between these unsophisticated investors and the Respondent Bank that would make the Bank liable for the investors' losses. Lack of evidence on the existence of such a relationship was fatal to Petitioners' cause in the lower courts – not lack of jurisdiction or immunity of the Bank to Petitioners' claims. Petitioners have presented no compelling reason for review.

In the early 1980's, a promoter named William Tully, together with a few associates, formed a series of gas and oil limited partnerships, known as the "Mid-America Energy Oil and Gas" programs or "Mid-America Partnerships." These programs were sold to unwary investors, including Petitioners, who, when their expectations were disappointed, filed suit against numerous defendants, including Purdue National Bank (now known as Bank One, Indiana N.A., formerly Bank One, Lafayette, N.A.). These plaintiffs, now Petitioners herein, sought to hold

the defendants liable for their investment losses. (William Tully was a defendant, although not a party to the appeal to the Seventh Circuit or to this proceeding.)

Petitioners' suit in the district court alleged acts in violation of the federal Securities Act of 1933 [15 U.S.C. § 77a, *et seq.*], violation of SEC Rule 10(b), and federal RICO statutes (18 U.S.C. § 1961 *et seq.*) predicated on mail fraud and wire fraud. Jurisdiction of Petitioners' suit in the district court was based on 28 U.S.C. § 1331, which gives federal courts original jurisdiction over civil claims "arising under the Constitution, law or treaties of the United States." In addition, jurisdiction over the federal RICO claims was conferred under 18 U.S.C. § 1964(c), which states in pertinent part: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court. . . . " Petitioners also alleged violations of state law, over which violations the district court had jurisdiction under the doctrine of pendent jurisdiction. This doctrine allows a federal court to decide state claims over which it would otherwise lack jurisdiction when both state and federal claims arise out of "a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 751, 86 S.Ct. 1130 (1966). (This concept was codified under the name of "supplemental jurisdiction" in 28 U.S.C. § 1367; however, 28 U.S.C. § 1367 applies to actions commenced after its date of enactment, which was December 1, 1990. Therefore this statute does not appear to govern the present case, which commenced in 1984.)

Petitioners eventually settled with, got judgments against, or dismissed all defendants except Respondent

Bank. Although Petitioners advanced both federal law and state law as legal bases for liability on the part of Respondent Bank, the parties agreed that the factual basis of all Petitioners' legal theories was the existence of an escrow relationship among the Bank as third-party escrow agent, Petitioners, and the various limited partnerships formed by Tully and his associates. *See* District Court Order, Petition, Appendix B, p. 11a. If no escrow relationship was established with Petitioners' monies, all claims of Petitioners against Respondent Bank would fail. *Id.*

Respondent Bank denied any escrow relationship with Petitioners. Petitioners' evidence that an escrow relationship existed included statements in the offering materials prepared by Tully and his attorneys that the Bank would act as an escrow agent for Petitioners' monies, evidence that Tully opened commercial checking accounts at the Bank, two of which carried the term "escrow" in the account name given by Tully, and some witnesses who were willing to testify that they saw written escrow agreements (although the Bank denied entering into such an agreement and none was ever produced) or that agents of the Bank told them there were escrow accounts (although this, too, was denied by the Bank). Issues in the case against the Bank were to be bifurcated for trial, the first phase of which was to be trial on the issue of the existence of an escrow relationship. The issue to be presented in the liability phase was narrowly drawn, as stated in the Pretrial Order:

> Whether the bank accounts at Purdue National Bank in the name of the Mid-America Partnerships or related programs, including the Tully

> program, were demand checking accounts so that Purdue National Bank was only obligated to disburse or transfer funds from such accounts at the direction of the persons with signature authority over the accounts; or, were the bank accounts being held by Purdue National Bank as an escrow agent or as a "purported" escrow agent so that Purdue National Bank assumed additional fiduciary duties?

Id. at p. 10a.

After formulation of the precise issue for trial, and prior to commencement of the trial, Respondent Bank filed a motion for summary judgment and a supporting memorandum in which Respondent pointed out that Petitioners admitted giving their monies directly to Tully or his associates and the documents themselves showed that none of Petitioners' funds had been deposited in accounts over which the Bank had authority to withhold funds from Tully. Petitioners answered and submitted three volumes of documentary evidence in opposition to the motion. *See id.* at p. 6a. Upon consideration, the District Court found that "regardless of whether plaintiffs [Petitioners herein] intended to create an escrow relationship with P[urdue] N[ational] B[ank], and regardless of whether a genuine issue of material fact exists concerning an alleged escrow agreement" no escrow relationship with Purdue National Bank was established as a matter of law because the Petitioners failed to satisfy the delivery element necessary under Indiana law to establish an escrow relationship. *Id.* at p. 11a. That is, Petitioners failed to show that their funds reached any account but the demand checking accounts established by Tully. Such

accounts as a matter of law created no escrow relationship with the Respondent Bank so as to make the Bank liable to Petitioners for withdrawals by Tully. Consequently, the district court granted summary judgment in favor of the Bank and against Petitioners.

The result of summary judgment in favor of the Bank was that all of Petitioners' claims failed. After entry of final judgment against Petitioners, Petitioners appealed to the Court of Appeals for the Seventh Circuit. Judge Easterbrook, writing for the Seventh Circuit panel, succinctly summarized the evidence and Petitioners' position, when he says in pertinent part:

> The Bank was not a promoter or underwriter of the partnerships; it did not sign the offering circulars or have a financial interest in the ventures. . . . According to the circulars, the Bank was to serve as escrow agent. Nonetheless, Tully placed the money into demand accounts over which he had (and used) full dominion. Plaintiffs [Petitioners herein] believe that the Bank's failure to control access to the funds defrauded them. . . . [However, Petitioners] did not remit funds to the Trust Department of the Bank as escrow agent; they gave negotiable instruments to Tully, who deposited them into commercial accounts at the Bank. . . . Plaintiffs ask us to treat this as equivalent to delivery from the investors to the Bank; after all, they say, the funds came into the Bank's hands. So they did – but not into the Bank's hands *as the investors' agent*. [Emphasis in original.]

Opinion of the Seventh Circuit, Petition, Appendix A, p. 2a-3a.

The Seventh Circuit affirmed the decision of the district court, saying: "[W]e agree with the district court that the investors could not prevail at trial, so the judgment is sound." *Id.* at p. 2a.

REASONS FOR DENYING THE PETITION

The decision below, affirming that of the district court, is correct. There is no conflict or any other compelling reason for further review by this Court.

A. Petitioners' argument that the Federal District Court has jurisdiction under Federal RICO statutes to hear the Petitioners' Claims as to whether Purdue National Bank violated Federal and State RICO statutes presents no issue for review.

Petitioners state there is an issue on whether the federal district court had jurisdiction to hear their federal and state RICO claims against the Bank. Petitioners then argue that the federal court did have jurisdiction. *See* Petition, p. 22. The question of federal jurisdiction was first raised at oral argument before the Seventh Circuit panel. The parties were directed to file supplemental briefs addressing this question. The brief of Respondent agreed with Petitioners that federal jurisdiction existed. The judges apparently reached the same conclusion. The published opinion of the Seventh Circuit states parenthetically: "The pending RICO claim made it proper for the district court to exercise supplemental jurisdiction over the state-law claim." *Id.* at p. 2a. Petitioners incorrectly state that the Seventh Circuit "held there were [*sic*]

no federal jurisdiction and thus the matter should be dismissed." Petition, p. 25. Petitioners' statement is without basis and contrary to the explicit language of the published Opinion stating that there was federal jurisdiction over Petitioners' claims.

Petitioners state in their Petition: "There is little question but what the federal courts had jurisdiction to hear the matter . . . . " Petition, p. 22. In this Petitioners are correct. There is little question and no issue. The district court did not dismiss Petitioners' action for lack of jurisdiction but entered judgment against them because of evidence prejudicial to a critical element of their case. *See* District Court Order, Petition, Appendix B, p. 18a ("Because plaintiffs failed to effectuate a proper and lawful delivery of the subject matter of the alleged escrow, and because Mid-America never relinquished control . . . no escrow was ever established. Thus, defendant is entitled to summary judgment as a matter of law."). Likewise, the Seventh Circuit affirmed on the basis that "the investors could not prevail at trial," not on the basis of lack of jurisdiction to decide the issues. *See* Opinion of the Seventh Circuit, Petition, Appendix A, p. 2a. Any issue on jurisdiction that may have existed at the Seventh Circuit was resolved in favor of the position taken by Petitioners. No controversy exists on this "issue."

Rule 10 of the Rules of the Supreme Court states: "A petition for a writ of certiorari will be granted only for compelling reasons." Petitioners have raised no issue for review and therefore no compelling reason to grant their Petition.

B. Petitioners' argument that Purdue National Bank, as created under the National Bank Act, is not entitled to certain immunities from their claims relative to the Bank's trust department acting as an escrow agent or purported escrow agent for Petitioners' investment funds presents no issue for review.

Immunity presumes wrongful conduct for which no redress is available. Immunity was not a defense raised by Respondent at the district court nor argued by Respondent at the Seventh Circuit. Immunity was not the basis for the rulings by the district court or the Seventh Circuit.

Petitioners misstate and mischaracterize the rulings of the district court and the Seventh Circuit to bolster a position without a basis in the record. Petitioners state that " . . . the Bank was guilty of violating federal R.I.C.O. violations [*sic*] by acting or purporting to act as an escrow agent for the various Mid-America Energy Oil and Gas Programs in which Petitioners' funds were invested." Petition, p. 28. Petitioners also state that "the lower courts conceded the Bank acted or purported to act as an escrow agent over a million dollars of invested funds owned by Petitioners" and that "the Seventh Circuit Court of Appeals decision directly gave Purdue National Bank immunity from such misconduct" [as an escrow agent]. *Id.* However, lower courts did not find that Respondent Bank acted as an escrow agent over Petitioners' funds. To the contrary, the district court's order granting summary judgment in favor of Respondent Bank states: "The new evidence indicates that it was legally

impossible for an escrow relationship to have been created between plaintiffs and defendant. . . . " District Court Order, Petition, Appendix B, p. 11a. The district court also states: "As a matter of law, no escrow relationship was ever established with PNB because of the legally deficient manner of delivery." *Id.* The Opinion of the Seventh Circuit affirmed the judgment of the district court and states: "The Bank did not act as escrow agent. . . . " Opinion of the Seventh Circuit, Petition, Appendix A, p. 2a. If the Bank was not an escrow agent of Petitioners' monies, the Bank could not have engaged in misconduct as an escrow agent. There is no misconduct for which it could have been given immunity.

The Seventh Circuit did not create some new "immunity" for banks or take away Petitioner's right to legal redress, as suggested by Petitioners. *See* Petition, pp. 28-29. Rather, the Seventh Circuit refused to redefine the relationship of a bank to the payors of the bank's depositors in a way that would allow Petitioners to recover their investment losses from the Bank. The Seventh Circuit declined to recognize a *new* duty on the part of banks to investigate all deposits to satisfy themselves that depositors were entitled to withdraw funds deposited by them. *See* Opinion of the 7th Circuit, Petition, Appendix A, p. 4a ("Requiring a bank to restrict all deposits until satisfying itself that the depositor is entitled to the money would pour molasses on the gears of commerce – and with little benefit to people like the plaintiffs, for malefactors would just make sure that they did not maintain their accounts at the banks that were supposed to be escrow agents."). Petitioners themselves cite no authority that supports the

imposition of such a duty and Respondent has uncovered none.

Petitioners have created an issue that does not exist in the record. A finding by this Court that Respondent Bank is not immune to the claims of Petitioners would not affect the judgment below, which was based on lack of evidence on a critical element of Petitioners' case – not on immunity. The resources of this Court should not be wasted upon a case that presents little more than a veiled request for review of the factual record below without any showing that the factual findings by the district court or its judgment based on those findings were incorrect.

CONCLUSION

The petition for a writ of certiorari is based on "issues" not in controversy, is frivolous and should be denied summarily.

Respectfully submitted,

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